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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
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No. 71-884

STEPHEN S. CHANDLER, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF OKLAHOMA,

Petitioner,
(Plaintiff-Appellee, Court Below)

v.

WILLIAM H. PAT O'BRYAN,

Respondent,
(Defendant-Appellant, Court Below)

THE UNITED STATES OF AMERICA appeared as *Amicus Curiae* on behalf of Petitioner in the Courts Below by L. Patrick Gray III, Assistant Attorney General, Civil Division, by Morton Hollander and Irwin Goldbloom

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDIX

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PRINTER'S ERRORS CORRECTED
NEW PAGES (i),(ii),3,8,11,12

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on May 11, 1971.

CITATION TO OPINIONS BELOW

The forty-five page opinion of the Court of Appeals is reported at 445 F.2d 1045, and attached as *Appendix A;* Petition for Rehearing in banc was denied September 9, 1971, not reported, and is attached as *Appendix B;* issuance of mandate was stayed to and including December 8, 1971, by order of the Court of Appeals dated November 12, 1971, attached as *Appendix C;* the time allowed by law for filing Petition for Certiorari in this Court will expire on the 7th day of January, 1972. The mandate was stayed and the time extended to January 7, 1972, by order of this Court dated December 3, 1971, attached as *Appendix D* (A-577).

The opinions and judgments of the *trial* court by Chief Judge Frank J. Battisti of the United States District Court for the Northern District of Ohio, assigned, which were reversed by the Court of Appeals are attached hereto, as follows:

Memorandum Opinion filed June 12, 1969, marked *Appendix E,* not reported;

Memorandum Opinion and Order filed April 23, 1970, marked *Appendix F,* reported in 311 F. Supp. 1121;

Declaratory Judgment and Writ of Prohibition, marked *Appendix G,* not reported;

Writ of Mandamus and Prohibition filed May 4, 1970, marked *Appendix H,* not reported;

Writ of Prohibition in the related case of *O'Bryan v. Chandler,* Civil 67-88, U.S.D.C. for the Western District of Oklahoma; entered September 25, 1967, marked *Appendix J,* not reported.

The Opinions in related cases necessary to ascertain the grounds of the judgments and decrees are attached hereto as follows:

O'Bryan v. Chandler, not reported, Oklahoma State Court libel action for $1,500,000, marked *Appendix K;*

O'Bryan v. Chandler, No. 7400 Court of Appeals, not reported, marked *Appendix L;*

O'Bryan v. Chandler, 249 F. Supp. 51, marked *Appendix M;*

O'Bryan v. Chandler, 352 F.2d 987, marked *Appendix N;*

State of Oklahoma ex rel Oklahoma Bar Assocation, Complainant v. William Howard (Pat) O'Bryan, Respondent, 385 PAC.2d 876, see *Appendix U*, pp.3,4.

In the Matter Pertaining to W.H. Pat O'Bryan, Misc. No. 7, U.S.D.C. for the Western District of Oklahoma, not reported, marked *Appendix P;*

W.H. Pat O'Bryan v. Stephen S. Chandler, appeal by O'Bryan from Misc. 7, USDC (Appendix P) under wrong title, marked *Appendix Q;*

O'Bryan v. Chandler, Chief Judge, C.A. 9563, 399 F.2d 916, cert. denied 394 U.S. 906, 22 L. Ed. 2d 217, 89 S. Ct. 1014, marked *Appendix Q-4.*

O'Bryan v. Chandler, Petition for Prohibition and Mandamus, No. 1517 Misc., Oct. 1966 Term, U.S. Supreme Court, Denied June 12, 1967; 384 U.S. 904, 18 L.Ed.2d 1377, 87 S. Ct. 2131;

Application for Reinstatement to Oklahoma State Bar denied by Supreme Court Opinion filed January 12, 1971, Vol. 42, page 33, The Journal, published by Oklahoma Bar Association, Opinions of Supreme Court, marked *Appendix S.*

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals judgment was entered May 11, 1971, a rehearing in banc was denied September 9, 1971, mandate was stayed and time to file Petition for Writ of Certiorari was extended by order of the Court of Appeals

to December 8, 1971, by order dated November 12, 1971, attached as Appendix C and the mandate was stayed and time extended to file Petition for Writ of Certiorari by order of this Court on December 3, 1971, until January 7, 1972 (A-577).

QUESTIONS PRESENTED

There are several legal questions involved in the case which require construction of Federal statutes enacted by the Congress by virtue of power granted by a specific Constitutional provision that are of vital importance to the public, and especially to the entire Federal judiciary, that are deserving of the most careful presentation to and consideration by this Court, to wit:

1. Does a United States District Court have original jurisdiction to determine whether a Federal Judge was acting within his jurisdiction when he performed certain acts and is therefore judicially immune from liability therefor?

2. Does an action seeking a determination by a United States District Court of the judicial immunity of a United States District Judge for certain acts performed by him in the performance of his duties or under color of office arise under the Constitution or laws of the United States?

3. Does the question of judicial immunity of a Federal Judge for his official acts involve the question of the extent of the jurisdiction of a United States District Court as defined by the Constitution and laws of the United States?

4. Has a United States District Court original jurisdiction to adjudicate the extent of the jurisdiction of United States Courts?

5. Is such a determination purely a Federal question involving the construction of the Constitution and laws of the United States?

6. Where an actual controversy exists between a United States District Judge and a disgruntled lawyer as to whether the judge is judicially immune from liability for certain acts

performed by him, does a United States District Court have original jurisdiction to declare the rights and other legal relations of the judge and the disgruntled litigant by a Declaratory Judgment of judicial immunity in an action brought by the judge under authority of 28 U.S.C. § 2201 and § 2202 and Rule 57 FRCP for the purpose of obtaining a speedy adjudication of that question and avoiding a multiplicity of actions?

7. In order to enforce such a Declaratory Judgment of judicial immunity, does a United States District Court, as authorized by 28 U.S.C. § 2283, in aid of its jurisdiction — and to protect and effectuate its judgment, have power and jurisdiction to stay further proceedings pending against the judge in a State court involving the same acts from which the United States District Court has decreed him to be immune from liability?

8. Where a lawyer, who filed a $1,200,000 verified claim against a bankrupt estate for attorneys fees, which claim a United States District Judge decreed to be fraudulent and denied and where because of said fraudulent conduct the judge also disbarred the lawyer, which judgments had long since become final, files over a period of many years a series of harassing, defamatory and groundless actions against the judge based upon his official acts in so doing and continues to file similar actions against the judge based upon the same official acts and acts in relation thereto and three such actions are still pending against the judge in various courts, does a United States District Court have original jurisdiction to entertain and adjudicate a Declaratory Judgment action brought by the judge in the nature of a Bill of Peace for the purpose of obtaining a decree that he is judicially immune from liability for said acts, and does the United States District Court have the power and jurisdiction to stay proceedings against the judge in a State court based upon the same acts from which the court has decreed the judge to be judicially immune from liability in order to protect and effectuate such judgment of judicial immunity?

STATUTES INVOLVED

The Constitutional statutory provisions involved are:

Article III, § 1, United States Constitution empowering the Congress to create inferior courts;

28 U.S.C. § 132 creating United States District Courts;

28 U.S.C. § 1331(a) delineating original jurisdiction of United States District Courts;

28 U.S.C. § 2201 and § 2202 creating a remedy by Declaratory Judgment in addition to other available remedies;

Rule 57 FRCP authorizing a remedy by Declaratory Judgment even if another adequate remedy exists and providing for speedy hearing by advancement on the calendar of Declaratory Judgment actions;

Rule 56 (a), (b) and (c), FRCP authorizing Summary Judgment when there is no genuine issue as to any material fact;

28 U.S.C. § 2283 prohibiting injunctions by United States Courts to stay proceedings in State courts *except* where expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The foregoing rules and statutes are set out verbatim in *Appendix T.*

STATEMENT OF THE CASE

Judge Chandler is now and has been since June 16, 1943, an active duly appointed, confirmed and qualified United States District Judge for the Western District of Oklahoma.

This is a simple Declaratory Judgment action brought by Judge Chandler in his official capacity seeking a Declaratory Judgment of judicial immunity from liability for certain acts performed by him in the performance of his duties.

The action was brought for the purpose of avoiding a multiplicity of actions and obtaining a speedy adjudication of his rights.

Chief Judge Frank J. Battisti of the United States District Court for the Northern District of Ohio, was assigned to hear the case. He determined that an actual controversy existed, that he had original jurisdiction of the subject matter under 28 U.S.C. § 1331(a) and exercised his discretion to assume jurisdiction and hear and adjudicate the Declaratory Judgment action as authorized by 28 U.S.C. § 2201 and § 2202. He then by summary judgment decreed that Judge Chandler was judicially immune from liability for certain specific acts. He also enjoined the defendant O'Bryan, a disgruntled lawyer and accountant, and the State court from proceeding further in a $2,500,000 libel action brought by O'Bryan against Judge Chandler based on said acts or acts in relation thereto and also enjoined O'Bryan from filing future actions against Judge Chandler based on said acts or acts in relation thereto.

Over a period of more than a decade O'Bryan had filed a series of groundless defamatory actions against Judge Chandler (three of them were pending in various courts at the time of the filing of the Declaratory Judgment action) in retribution for Judge Chandler's official acts in denying a verified claim for $1,200,000 attorneys fees filed by O'Bryan against a bankrupt estate. Judge Chandler, sitting in the bankruptcy action, had adjudged the claim to be fraudulent and had judicially found that the claim had theretofore been paid in full and that the written contract offered to support it had been wholly fabricated by O'Bryan and the President of the bankrupt corporation who was later convicted on 47 counts of fraud and sentenced to five years imprisonment for fraudulent acts in connection with the bankrupt corporation. Judge Chandler also had disbarred O'Bryan for his fraudulent conduct. No appeals were taken by O'Bryan and the judgment denying the fraudulent and fabricated claim and the order of disbarment became final in December 1958.

In 1959 O'Bryan obtained new counsel, filed a motion for reconsideration of the claim and the order of disbarment, which motion was denied by Judge Chandler. O'Bryan appealed to the Court of Appeals and the appeal was dismissed as untimely filed. 274 F.2d 831. O'Bryan then filed a motion in District Court to set aside the disbarment order for lack of due process. In 1967 the motion was heard and denied by United States District Judge Edwin Langley, assigned, who held the disbarment order to be valid. App. P.

In 1963 O'Bryan sued Judge Chandler for $10,000,000 for malicious prosecution, libel and slander for his acts in relation to the denial of the claim and the disbarment order and Judge Chandler was held to be judicially immune from liability. The judgment became final when this Court denied certiorari in 1966. App. M and N.

Nine days after the decision of the Court of Appeals affirming the judgment of judicial immunity from liability and while O'Bryan was petitioning this Court for certiorari in that case, he filed in State Court another libel and slander action against Judge Chandler for $2,500,000 based on statements made by Judge Chandler in an official brief filed in the Court of Appeals in defense of the case which is still pending.

In March 1967 he filed original Petition for Prohibition and Mandamus in this Court against Judge Chandler, No. 1517 Miscellaneous, October 1966 Term, entitled *O'Bryan v. Chandler*, which was denied June 12, 1967, although present counsel for Judge Chandler asked the Court at that time to take jurisdiction of the matter and end the series of actions continuing to be brought by O'Bryan against Judge Chandler as he now continues to pray.

REASONS FOR GRANTING THE WRIT

1. The question decided by the Court of Appeals involves the narrow Federal question of the jurisdiction of a United States District Court in a Declaratory Judgment action to entertain and determine the question of the judicial immunity of a Federal judge for official acts performed by him.

2. The important question of Federal law has not been, but should be, settled by this Court. The decision of the Court of Appeals appears to be directly contrary to the relevant decisions of this Court.

3. The decision of the Court of Appeals is in conflict with the relevant decisions of all other Courts of Appeals on the same matter.

4. There is no rule of law or adjudicated case to sustain it.

5. If this Court does not grant certiorari and decide the question, the Petitioner, a Federal judge, will be required to go through the ordeal of a State court trial, an appeal to the State supreme court and then bring the matter here for final decision because no State court has the power and jurisdiction to decide the purely Federal question of the judicial immunity of a Federal judge. The question of the jurisdiction to make such a determination has heretofore been preempted by the Federal courts.

ARGUMENT

Counsel has spent several months in a sincere effort to prepare a Petition for Certiorari pointing out and documenting by the record the irrelevancy and inaccuracy of the gratuitous statements of the Court of Appeals but has finally realized that it would be an imposition on the Court and obscure the real issues to be lured into straying so far afield to knock down the snow man.

Although the Opinion of the Court of Appeals is 45 pages in length and almost in its entirety discusses facts and law

in other cases long res judicata which we believe to be wholly irrelevant to the issues in the instant Declaratory Judgment action now before the Court for review, the Court of Appeals finally on page 44 limits its adjudication to the question of the jurisdiction of the trial court. The opinion concludes:

> "The *decision on the merits*, including, inter alia, the related issue of judicial immunity is *not* for our determination. *We lack jurisdiction over the subject matter.*" (Italics ours)

This concluding statement simplifies the issues to the extent that it is not necessary to burden this Court with a discussion of the irrelevant historical matter discussed by the Court of Appeals in its rather too lengthy opinion which is confusing, irrelevant and foreign to this single issue it finally holds is involved. In view of this conclusion of the Court of Appeals we believe it proper to discuss only the question of whether or not the trial court had jurisdiction over the subject matter of the action.

The Declaratory Judgment Act, 28 U.S.C. § 2201 and § 2202 creates a special remedy for the granting of declaratory relief. It provides that *in a case of actual controversy within its jurisdiction* any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of *any* interested party seeking such declaration whether or not further relief is or could be sought and that any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

An *actual controversy* existed between Judge Chandler and O'Bryan. At the time the Declaratory Judgment action was filed three actions filed by O'Bryan based on the acts for which Judge Chandler sought the decree of judicial immunity were actually pending against him in various courts of which the trial court took judicial notice.

The action clearly arises under the Constitution and laws of the United States. Article III, § I of the United States

Constitution authorizes the Congress to ordain and establish inferior courts. The powers and jurisdiction of a United States District Judge arise by virtue of two statutes passed by the Congress pursuant to the Constitutional grant of power: 28 U.S.C. § 132 creates the United States District Courts; 28 U.S.C. § 1331(a) delineates and defines the jurisdiction of United States District Courts.

28 U.S.C. § 1331(a) grants to United States District Courts *original jurisdiction* of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 and arises under the Constitution and laws of the United States.

"The *matter in controversy* exceeds the sum or value of $10,000" since one of the pending actions against Judge Chandler seeks to recover $2,500,000 for alleged libel.

The *matter in controversy* arose under the Constitution and laws of the United States since it requires an adjudication as to whether Judge Chandler was acting within his jurisdiction when he performed the acts involved and such a determination requires a construction of the Constitution and the Federal statutes creating and fixing the jurisdiction of United States District Courts which is undeniably a Federal question. The Court of Appeals concedes this when it states "It is true that the immunity issue is a federal question. *Howard v. Lyons*, 360 U.S. 593, 597 (1969), * * *" on page 1055 of the Opinion. App. A.

Thus it must be conceded that the United States District Court had *original jurisdiction* of the subject matter of the Declaratory Judgment action by virtue of the Constitutional provision, 28 U.S.C. § 132 and 28 U.S.C. § 1331(a).

All *facts* necessary for the adjudication of Judge Chandler's judicial immunity are beyond dispute. Long ago they became res judicata. That he had jurisdiction in the Bankruptcy Reorganization proceeding to deny O'Bryan's fraudulent claim and disbar him has been many times over finally adjudicated. All of his acts for which he sought the decree of judicial immunity in the instant case and which are the

basis of O'Bryan's series of actions against him are clearly in relation to the denial of his claim and his disbarment which this Court and the courts of all circuits have held to be sufficient to make him judicially immune therefor.

But in view of the statement of the Court of Appeals that "The decision on the merits, including, *inter alia*, the related issue of judicial immunity is not for our determination. We lack jurisdiction over the subject matter," we will not belabor the point.

We are content to rest on the jurisdictional question. We do, however, file herewith an Appendix which contains the well considered opinions of Judge Battisti, which we shall not attempt to bolster by further argument. None is needed. There is not a rule of law or judicial decision in point to the contrary. The opinions in related cases, the Constitutional provision and statutes involved are conclusive.

A "Chart of Litigation" showing the history of the litigation initiated by O'Bryan growing out of Judge Chandler's official acts in denying his bankruptcy claim and disbarring him is included in the Appendix filed herewith as Appendix U. The preparation of the Chart was suggested by a chart used by counsel for O'Bryan at the oral argument of the case before the Court of Appeals to show the history of the litigation between O'Bryan and Judge Chandler. It was photographed and made a part of the record upon the motion of counsel for Judge Chandler.

The large black type beginning on page four represents the items on the chart used by counsel for O'Bryan. The typewritten matter preceding, interspersed between and following the items in large black type was prepared by Judge Chandler for the purpose of furnishing a clearer picture of the more than thirteen years of litigation to which Judge Chandler wished to put an end by the filing of the Declaratory Judgment action over which he now seeks by this Petition for a Writ of Certiorari to have this Court assume jurisdiction and finally determine.

If the Court denies the Petition for a Writ, Judge Chandler will be relegated to the long, expensive, and tortuous road of proceeding through the State trial court and the State supreme court on his journey back to this Court which is the only court which can finally determine the matter.

Verily it seems that Judge Chandler has been thrown to the lions where he has labored for more than thirteen years crying in the wilderness for the relief sought here by this Petition for Certiorari.

The many harassing defamatory actions initiated and relentlessly pursued by O'Bryan and his counsel as retribution for the official acts of a United States District Judge who has grown old in the public service have for many years obstructed him in the performance of his official duties and burdened his twilight years. He has been required to obtain counsel and assist in the defense of the many patently groundless proceedings at great personal effort and expense. Much of his time and strength over more than a decade has of necessity been thus expended.

CONCLUSION

Counsel respectfully submits that no good purpose can be served by requiring Judge Chandler to defend O'Bryan's groundless pending libel action through State Courts until again he reaches this Court of last resort where the question presented herein can only and must ultimately be finally adjudicated.

Respectfully submitted.

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Attorney for Petitioner

APPENDIX A

Stephen S. CHANDLER, United States District Judge for the Western District of Oklahoma, Plaintiff-Appellee,

v.

William H. Pat O'BRYAN, Defendant-Appellant.

No. 354-70.

United States Court of Appeals, Tenth Circuit.

May 11, 1971.

Rehearing Denied Sept. 9, 1971.

Declaratory judgment action brought by federal judge in nature of bill of peace to enjoin defendant from further litigation against plaintiff and to have state libel judgment against plaintiff expunged. The United States District Court for the Western District of Oklahoma, Frank J. Battisti, J., 311 F.Supp. 1121, granted plaintiff's motion for summary judgment and issued mandatory injunction and defendant appealed. The Court of Appeals, Floyd R. Gibson, Circuit Judge, held that where prior malicious prosecution action, removed to federal court and dismissed on ground of judicial immunity of judge, arose out of his conduct in relation to grand jury proceeding and the subsequent state libel action arose out of his conduct four years later in delivering allegedly libelous statements to newspaper, the instant action could not be justified as necessary to protect and effectuate the prior federal judgment.

Reversed and remanded with directions.

1. Declaratory Judgment ⇐212

Declaratory Judgment Act is not a jurisdictional statute, but is remedial only; any jurisdiction over controversy must be found in other statutes conferring jurisdiction. 28 U.S.C.A. § 2201.

2. Declaratory Judgment ⇐114

Where prior malicious prosecution action, removed to federal court and dismissed on ground of judicial immunity of federal judge, arose out of judge's conduct in relation to grand jury proceeding and, later state libel action against him arose out of his conduct four years later in delivering allegedly libelous statements to newspaper editor, subsequent federal declaratory judgment action in nature of bill of peace to have state's libel judgment enjoined and expunged could not be justified as necessary to protect and effectuate prior federal judgment. 28 U.S.C.A. § 2201.

3. Courts ⇐284

Although question of federal judge's immunity from libel suit was federal question, it was in nature of a federal defense to a libel suit instituted under state law and as such was not sufficient to convey original jurisdiction on federal court. 28 U.S.C.A. § 1331.

4. Courts ⇐299(2, 4)

Federal jurisdiction based on federal question must appear from plaintiff's complaint and anticipation in the complaint of federal defense, where plaintiff's basic cause of action is grounded only on state law, will not suffice to establish original federal jurisdiction. 28 U.S.C.A. § 1331.

5. Courts ⇐299(3)

Where state libel suit was based on state laws and in no way raised federal question in and of itself, assertion by defendant federal judge, after judgment against him, of judicial immunity was in nature of a defense to that suit and therefore did not convey original federal question jurisdiction on federal court in the judge's subsequent declaratory judgment action to have state judgment expunged. 28 U.S.C.A. §§ 1331, 2201.

6. Declaratory Judgment ⇐274

Federal court did not have jurisdiction of declaratory action brought by federal judge to have expunged state libel judgment against him on theory that action was one in nature of bill of peace to protect federal judge from harassing and vexatious lawsuits which had prevented him from performing his functions as federal judge. 28 U.S.C.A. §§ 1331, 2201.

7. Removal of Cases ⇐107(9)

Statute providing that order remanding removal of case to state court is not reviewable establishes congressional policy of not permitting interruption of litigation of merits of removed case by prolonged litigation of questions of jurisdiction of district court to which cause was removed. 28 U.S.C.A. § 1447(d).

8. Declaratory Judgment ⇐276

Congressional policy of not permitting interruption of litigation of merits of removed cause by prolonged litigation of questions of jurisdiction of district court to which cause is removed cannot be avoided by invoking provisions of declaratory judgment act in a case which has been remanded to a state court. 28 U.S.C.A. § 1447(d).

9. Removal of Cases ⇐107(8)

So far as question of forum in which a cause is to be litigated is concerned, determination of federal district court that case is not removable and remanding it to state court is final. 28 U.S.C.A. § 1447(d).

10. Judgment ⇐720

Where district judge considered all questions raised on his hearing of removal of state libel suit and determined that case should be remanded for state court trial, that decision was res judicata on issue of forum. 28 U.S.C.A. § 1447(d).

11. Courts ⇐405(3.5)

Policy of finality in orders remanding removed case for trial in state court is applicable in federal question cases. 28 U.S.C.A. § 1447(d).

12. Courts ⇐489(16)

State court was not ousted of jurisdiction in state libel action against federal judge merely because judge's defense presented a federal question and state court had right or duty to entertain that question.

13. Removal of Cases ⇐109

Fact that defendant had right of removal did not divest state court of jurisdiction, once that question had been determined against him and case had been remanded to state court. 28 U.S.C.A. § 1447(d).

14. Courts ⇐508(2)

Where state court had jurisdiction of libel suit, federal district court ordered remand of case to state court and later federal suit to restrain enforcement of state libel judgment did not fall within any exception of federal rule prohibiting federal court from enjoining state proceedings, order enjoining further proceedings in state libel suit was improper. 28 U.S.C.A. § 2283.

15. Courts ⇐508(1)

Mere apprehension that state court will not adequately protect a federal right was not sufficient basis for issuance of injunction restraining further proceedings in state court. 28 U.S.C.A. § 2283.

16. Declaratory Judgment ⇐276

Where injunction restraining state court proceedings is prohibited by federal statute, declaratory relief should not be given. 28 U.S.C.A. §§ 2201, 2283.

Carl L. Shipley, Washington, D. C. (Merton Hollander and Irwin Goldbloom, Dept. of Justice, Washington, D. C., for United States amicus curiae), for plaintiff-appellee.

Harvey L. Davis and Reagan M. Martin, Dallas, Tex., for defendant-appellant.

Before VAN OOSTERHOUT, MEHAFFY and GIBSON, Circuit Judges.*

FLOYD R. GIBSON, Circuit Judge.

The defendant, W. H. Pat O'Bryan, appeals from a declaratory judgment and injunction entered against him and in favor of the plaintiff, Stephen Chandler, Senior Judge of the United States District Court for the Western District of Oklahoma, enjoining O'Bryan from enforcing a libel judgment (for $50,000)

* All Circuit Judges of the Eighth Circuit sitting by designation.

obtained in the state courts of Oklahoma against Judge Chandler, enjoining him from any further litigation against Judge Chandler, and ordering the judgment in the State court expunged from the record.[1] The facts of this controversy have a long and complex history, and an understanding of the rather narrow legal issues involved in this appeal requires a rather detailed factual statement.

I. THE FACTS

A. The Background—the Selected Investments Bankruptcy.

The controversy between the parties had its origin in the bankruptcy litigation of the Selected Investments, Corporation.[2] The Selected Investments Corporation was an Oklahoma corporation organized in 1930 which dealt in securities with the general investing public. Without going into collateral details, we may say that the organization was a cleverly manipulated, fraudulent scheme which operated for more than 20 years without being discovered. *See* Burns v. United States, 286 F.2d 152 (10 Cir. 1961). Sufficient funds to meet the claims of its investors, thereby avoiding undue complaint which might attract the attention of public authorities, were acquired by the hazardous expedient of not paying income taxes.

However, by the early 1950's, the company had come to the attention of both state and federal taxing authorities and it was apparent that the day of reckoning was fast approaching. Not having a tax attorney on its staff, the company in February 1953 hired the defendant O'Bryan, who was both a certified public accountant and practicing attorney specializing in tax matters, to represent it in the tax litigation. The circumstances of O'Bryan's retention are not entirely clear, as will become evident, but it is undisputed that he in fact spent a good deal of time attending to the corporation's tax problems and was in substantial measure successful in obtaining significant rulings favorable to the corporation.

In the complicated proceedings which ensued with both the state and federal authorities, it became apparent that the company's federal tax liability would be determined in part by decisions in the state courts. In 1957, the Supreme Court of Oklahoma ruled in the company's favor and against the Oklahoma Tax Commission on a claim for more than $500,000 of back state taxes. Selected Investments Corporation v. Oklahoma Tax Commission, 309 P.2d 267 (Okl.1957). Based on this decision, the federal authorities thereupon ruled that all back federal income taxes, if any, owed by the company, would be waived, but that in the future the company's tax liability would be computed differently, resulting in substantially increased payments. It later developed that certain Oklahoma Supreme Court Justices had been the recipients of a bribe in connection with the above decision.

The company was unable to continue its operations in the accustomed manner following the federal ruling as to its future tax liability and attempted to reorganize in a state receivership proceeding. This attempt precipitated in involuntary bankruptcy proceeding which was filed in the federal district court of Chief Judge Chandler.

B. O'Bryan's Claim in the Bankruptcy Litigation.

In early March 1958, O'Bryan had several telephone discussions with Selected's bankruptcy trustee involving questions pertaining to O'Bryan's filing a claim against the bankrupt's estate for

1. The District Court's opinion is reported in Chandler v. O'Bryan, 311 F.Supp. 1121 (W.D.Okl.1969).

2. Reported cases dealing with the bankruptcy may be found in Carey v. Selected Investments Corp., 319 F.2d 578 (10th Cir. 1963); Burns v. United States, 286 F.2d 152 (10th Cir. 1961); Workman v. Harrison, 282 F.2d 693 (10th Cir. 1960); and Selected Investments Corp. v. Duncan, 260 F.2d 918 (10th Cir. 1958), *cert. denied*, 359 U.S. 914, 79 S.Ct. 584, 3 L.Ed.2d 576 (1959).

legal fees for his work in the tax cases. These conversations left the trustee with the distinct impression that O'Bryan's claim would be based on an oral contract of employment with the company.

On March 24, 1958 O'Bryan filed a claim against the bankrupt's estate of more than $1,000,000 for the reasonable value of his services to the estate, alleging that this represented 10 per cent of the amount of taxes which he had saved the company in the tax litigation. In this claim he stated that he had received no note or security or other evidence of this indebtedness. On May 21, 1958, he amended his claim and alleged it was based on a written contract of October 29, 1954, which he had just found in his files.

On November 3, 1958, O'Bryan's claim came up for hearing in the bankruptcy court, Judge Chandler presiding. The trustee opposed the claim, not on the grounds that O'Bryan had not performed any services for the company, but on the ground that the written contract attached to the amended claim was manufactured and fraudulent, and had actually never been entered into by the parties until after the initiation of the bankruptcy proceedings. As the evidence developed at the hearing, Judge Chandler indicated that he agreed with the trustee's position and that if O'Bryan expected to prevail in his claim, he would have to overcome the evidence of fraud which had been presented. In addition to the inferences to be drawn from O'Bryan's prior conduct in the matter, there was some evidence presented by the trustee tending to indicate that the letterhead on which the contract was written had not been in existence in October 1954, and indeed had not been made up until September 15, 1955. Judge Chandler ordered another hearing to be set for November 10, 1958, and ordered O'Bryan to produce further proof of his claim.

At the November 10 hearing, O'Bryan appeared in person and by an attorney who had not previously represented him in these proceedings. He rested his claim and presented no new evidence. Judge Chandler thereupon denied the claim, and ordered O'Bryan disbarred from further practice in the federal court. No appeal was taken from either of these rulings.

C. The First Libel Suit.

Shortly after the above events, Judge Chandler wrote a letter to the Oklahoma Bar Association seeking O'Bryan's disbarment on account of his conduct in the bankruptcy proceedings. In March 1959, the Bar Association held a public hearing on the charges. No final action was taken by the Oklahoma Supreme Court in this matter until 1963, as discussed more fully below. On October 30, 1959, O'Bryan filed a libel suit in the state court against Judge Chandler, based on the letter written to the Oklahoma Bar Association. Shortly thereafter, Chandler's letter to the Bar Association was disclosed and the language did not talley with that quoted in O'Bryan's complaint. On December 1, 1959, O'Bryan dismissed his libel suit.

D. The Disbarment Proceedings.

In September 1959, O'Bryan filed a motion in the bankrupcty proceedings for reconsideration of his claim and restoration of his name to the role of admitted attorneys. This motion was denied by Judge Chandler; O'Bryan appealed and his appeal was dismissed as untimely. O'Bryan, O'Bryan & O'Bryan v. Harrison, 274 F.2d 831 (10th Cir. 1959).

In June 1963, the Oklahoma Supreme Court rendered its decision on O'Bryan's disbarment based on the public hearings held in March 1959. It concluded that the charges were true and ordered him disbarred. State v. O'Bryan, 385 P.2d 876 (Okl.1963), *app. dismissed*, 376 U.S. 649, 84 S.Ct. 983, 11 L.Ed.2d 980 (1964).

In July 1963, O'Bryan filed an original action in madamus in the Tenth Circuit against Judge Chandler, seeking to have the order disbarring him set aside. This was denied on the grounds that he could pursue the usual remedies available to him in the district court. O'Bryan thereupon, in September 1963, filed a

motion to vacate the disbarment order in the district court. No action was taken on this motion, and in January 1966, O'Bryan filed another mandamus action in the Court of Appeals seeking action on his motion to vacate. In October 1966, the Court of Appeals for the Tenth Circuit ordered Judge Chandler to assign the motion to vacate to another judge for hearing and disposition.

The proceedings were assigned to Judge Edwin Langley, of the Eastern District of Oklahoma, who on March 28, 1967, entered an order denying the motion. O'Brien appealed on July 18, 1967, alleging that Langley's order was entered without a hearing as required by the prior Tenth Circuit order. On December 29, 1967, the Tenth Circuit reversed Judge Langley's order, holding that a proper hearing had not been accorded O'Bryan. Judge Chandler thereupon filed a Motion to Clarify, which was treated as a petition for rehearing, in which he contended that O'Bryan's appeal from the order of Judge Langley was untimely. After hearing oral argument, the Tenth Circuit withdrew its order and dismissed the appeal as untimely. In re O'Bryan, 399 F.2d 916 (10th Cir. 1968), *cert. denied*, 394 U.S. 906, 89 S.Ct. 1014, 22 L.Ed.2d 217 (1969).

In 1968, the United States Treasury Department refused to disbar O'Bryan on these charges, and in 1970 the Oklahoma Supreme Court refused to reinstate him. Apparently his certification as a public accountant has not been withdrawn.

E. The Malicious Prosecution Suit.

O'Bryan's conduct in the bankruptcy litigation occurred in 1958. Judge Chandler was of the opinion that this conduct violated several federal criminal statutes and urged the United States Attorney to prosecute him. Two successive United States Attorneys in the Western District of Oklahoma refused to do so. Finally, in November 1961, Judge Chandler himself appeared before a grand jury and presented the evidence which he felt warranted prosecution. The grand jury returned an indictment against O'Bryan. This indictment was dismissed by Judge Frederick A. Daugherty of the Western District of Oklahoma on the grounds that Judge Chandler's presence in the grand jury room was a "technical irregularity" violating the secrecy of grand jury proceedings, without prejudice to the bringing of a new indictment. No new indictment was ever brought.

In September 1963, O'Bryan filed a $10,000,000 malicious prosecution, libel and slander suit against Judge Chandler in the Oklahoma state court, based on Chandler's actions in securing the grand jury indictment. The suit was removed to the federal court, and Judge Roy W. Harper of the Eastern District of Missouri was assigned to hear the case. Judge Harper ruled that Judge Chandler's actions were not wholly outside his jurisdiction as a federal judge and hence he was protected by the doctrine of judicial immunity from liability. O'Bryan v. Chandler, 249 F.Supp. 51 (W.D.Okl. 1964).

O'Bryan appealed from this decision. Judge Chandler was represented in this proceeding by the Department of Justice, the Oklahoma Bar Association as *amicus curiae*, and by private attorneys. On the day set for oral argument, the Tenth Circuit permitted Judge Chandler to file a document (hereinafter the "blue brief") which he styled as an "Official Statement." In the course of this document, Judge Chandler accused O'Bryan of being an accomplice, if not the mastermind, of the bribery of certain members of the Oklahoma Supreme Court in the Selected Investments case.

Some few days before the filing of this document, Judge Chandler called to his office the editor of the *Oklahoma Journal*, a local newspaper, and gave to him a preliminary draft (hereinafter the "tan brief") of the "Official Statement" which differed in some respects from the blue brief as filed, but which included the bribery charge. The day after the oral argument in the case, the *Oklahoma Journal* published a front-page story on the case which was headlined "O'Bryan Called 'Bribe Mastermind'."

Other newspapers in the area carried only short stories on the case and did not include the bribery charge.

O'Bryan filed a motion to strike the "Official Statement" which was denied by the Tenth Circuit; Judge Chandler's request in his "Official Statement" that an injunction and contempt citation be issued against O'Bryan was not acted on. Ultimately the Court affirmed Judge Harper's decision on the judicial immunity issue. O'Bryan v. Chandler, 352 F.2d 987 (10th Cir. 1965), *cert. denied*, 384 U.S. 926, 86 S.Ct. 1444, 16 L.Ed.2d 530 (1966).

F. The Second Libel Suit, and the Declaratory Judgment Action.

It is the following events which comprise the factual basis of the current litigation.

The Tenth Circuit decision in the malicious prosecution suit, holding Judge Chandler's actions before the grand jury were protected by the doctrine of judicial immunity, was rendered November 30, 1965. On December 8, 1965, O'Bryan filed another libel suit in the amount of $2,500,000 against Judge Chandler, this one based on the "tan brief" of the "Official Statement" which Judge Chandler released to the newspaper editor prior to oral argument in the malicious prosecution case, accusing O'Bryan of being the mastermind in the Oklahoma Supreme Court bribery. Judge Chandler removed this suit to the federal district court pursuant to 28 U.S.C. § 1442(a) (3).[3]

Judge Richard B. Austin of the Northern District of Illinois was assigned to hear the removal action and conducted a full hearing in April 1966. He determined that the cause was not removable because Judge Chandler's actions were not under color of office nor in the performance of his official duties.[4] Accordingly, he remanded the case to the State court. The order of remand is not reviewable under 28 U.S.C. § 1447(d), as is discussed *infra*.

Trial was had in the State court on the libel suit in February 1967. The state trial judge directed a verdict in favor of O'Bryan on the issue of liability, and the jury awarded $40,000 in compensatory damages and $10,000 in punitive damages. Following the rendition of this verdict, and prior to the entry of judgment, on February 26, 1967, Judge Chandler again removed the case to the federal district court. Sometime thereafter, the State court entered a judgment on the verdict.

O'Bryan filed a motion to remand the case in the second removal. The action was assigned to Judge Frank J. Battisti of the Northern District of Ohio. On January 13, 1968, Judge Chandler filed a declaratory judgment action "in the nature of a Bill of Peace" in the federal district court, alleging that O'Bryan was harassing him with many groundless actions, seeking to enjoin O'Bryan from further litigation against him, and seeking to have the state libel judgment enjoined and expunged. This declaratory judgment action was also assigned to

3. 28 U.S.C. § 1442 provides in pertinent part:

"(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

* * * * *

"(3) Any officer of the courts of the United States, for any Act. under color of office or in the performance of his duties."

4. Judge Austin's order of May 24, 1966, reads as follows:

"It is therefore ordered, adjudged and decreed that the Defendant's acts complained of in the Plaintiff's Original Petition were not done in the performance of his official duties as a Judge of the District Court of the Western District of Oklahoma, that they were not acts done under color of judicial office. There is no other Federal issue involved therefore the Plaintiff's motion to remand is granted and the case is remanded to the State Court from whence it came."

Judge Battisti, who ruled that the remand motion in the removed libel case would be held in abeyance until the disposition of the declaratory judgment action. Thereafter, evidence was received in the declaratory judgment action consisting mainly of court records in the various actions discussed above.

On April 23, 1970, Judge Battisti granted a motion for summary judgment in Judge Chandler's favor, and entered an order declaring that Judge Chandler was judicially immune from liability for the acts complained of in the State libel action, enjoining O'Bryan from any further litigation "involving the matters dealt with in the controversy before the United States Court of Appeals for the Tenth Circuit entitled O'Bryan v. Chandler, 352 F.2d 987 (1965) and matters in relation thereto," ordering the State court to expunge the libel judgment from its records and enjoining the State court from proceeding further and entertaining any further proceedings relating to the above matters. It is from this action that this appeal is taken.

II. THE LAW

A. Summary of the Parties' Contentions.

In order to facilitate understanding of the issues in this appeal, a brief summary of the parties' contentions is in order. It must be kept in mind that the second removal of the State libel action and the motion to remand in that case are still pending in the federal district court and have not yet been acted on. This appeal pertains only to the declaratory judgment holding Judge Chandler's actions in releasing the "tan brief" of his "Official Statement" to the newspaper to be judicially immune and enjoining enforcement of the State court judgment and any further litigation relating to this subject matter.

Appellant O'Bryan contends that this judgment is nothing more than a disguised review of Judge Austin's remand order, which is prohibited by 28 U.S.C. § 1447(d),[5] as well as a review of the propriety of the State court judgment, which of course is not within the jurisdiction of a federal district court. In addition, he contends that the injunction violated the provisions of 28 U.S.C. § 2283.[6]

Judge Chandler, on the other hand, contends that the judgment had no relationship to the prior remand order, in that there was an independent jurisdictional basis for the suit and the pendency of the libel suit in the State court did not defeat this jurisdiction. While the arguments in favor of this independent jurisdiction are not entirely clear, apparently three separate grounds are asserted: (1) that the judgment was necessary to protect and effectuate the Tenth Circuit judgment in O'Bryan v. Chandler, 352 F.2d 987 (10th Cir. 1965); (2) to establish his federal right of judicial immunity; or (3) to protect him as a federal judge from harassing and vexatious litigation. We may note that this last ground is considerably broader, at least in its factual basis, than the first two; and while it was urged at the trial level, it does not appear to have been relied on by the court in rendering its judgment. While we will give it independent consideration later in this opinion, in our initial analysis of the case, we will take into consideration only those issues raised by the trial court in its published opinion.

We turn now to a comparison of the issues raised in the declaratory judg-

5. 28 U.S.C. § 1447(d) provides in pertinent part as follows:
"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise * * *."
The exception of § 1443 pertaining to civil rights actions is not here material.

6. 28 U.S.C. § 2283 provides as follows:
"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

ment action with those raised before Judge Austin in the first removal hearing and in the State libel action.

B. Comparison of Issues in Removal Hearing, State Libel Action, and Declaratory Judgement Action

The trial court in its published opinion made the following findings which we believe to be relevant to the issues on this appeal:

"(1) Following the dismissal of O'Bryan's complaint in the United States District Court in O'Bryan v. Chandler, D.C., 249 F.Supp. 51, O'Bryan appealed to the Court of Appeals for the Tenth Circuit.

* * * * * *

"(3) While the appeal was pending, on August 18, 1965, Judge Chandler, with leave of the Court of Appeals, filed a brief or statement in the action. The brief or statement was entitled 'Official Statement of Judge Chandler.'

"(4) O'Bryan moved to strike the Official Statement on the grounds that it was not in the nature of a brief. On September 16, 1965, the Court of Appeals entered an order denying the motion to strike. The document was, accordingly, entered into the record of the judicial proceedings before the Court of Appeals.

"(5) The document in controversy is a supposed draft of the 'Official Statement of Judge Chandler' which he made available to a Mr. Clabes, Editor of an Oklahoma newspaper, on August 15, 1965. * * *

* * * * * *

"(7) The conduct of Judge Chandler and Mr. Clabes on August 15, 1965, was solely and directly related to the preparation and filing by Judge Chandler of his Official Statement." 311 F.Supp. at 1125.

Having made the above findings, the trial court then stated the issue before it as follows:

"The issue is whether the conduct of Judge Chandler was so connected to his defense of the litigation before the Court of Appeals that it was merged with the conduct adjudged by that court to be immune.

"The Court is persuaded to the affirmative." *Id.* at 1125-1126.

Judge Battisti recognized the problem of whether the declaratory judgment action could be construed as an attempt to review Judge Austin's order of remand in the State libel action. He concluded that Judge Austin had considered a very narrow issue in determining the question of removal jurisdiction, and that the issue in the declaratory judgment action was much broader. He made the distinction as follows:

"In that libel action, Judge Austin examined the document in question with the view to determining whether it, in itself, was an official act protected by judicial immunity. This Court viewed the issue before it to be whether Judge Chandler's actions could be construed as part of his defense before the Court of Appeals—as such, those actions could be said to merge with the final judgment of that court, covering all actions of Judge Chandler regarding the litigation." *Id.* at 1124.

As we read the Court's explanation, it is suggested that Judge Austin did not consider two factors in the case—(1) the relationship of Judge Chandler's actions in releasing the "tan brief" to the newspaper editor to his filing of the "blue brief" in the Court of Appeals and (2) the effect of the ruling of the Court of Appeals on the "Motion to Strike" the "blue brief." In other words, Judge Austin considered only the "tan brief" on its face, which admittedly was not filed in the appeal. However, we think this an unduly restricted view of Judge Austin's holding. While Judge Austin gave no written opinion on this ruling, a thorough reading of the transcript of the hearing before him reveals that both of these matters were considered and therefore necessarily passed on by

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him in his order of remand. The following excerpts are illustrative examples.

As to Judge Chandler's actions in releasing the "tan brief" to the newspaper, the following colloquy occurred between Judge Austin and Mr. Goldbloom, the attorney from the Department of Justice representing Judge Chandler:

"THE COURT: Do you think there would be any difference, Counsel, if rather than having delivered this to the editor as is alleged in the complaint, that this was filed in the Court of Appeals and the editor just happened to be over there and found it himself. Do you think there would be any difference?

"MR. GOLDBLOOM: No, Your Honor.

"THE COURT: You have answered my question, You feel it makes no difference?

"MR. GOLDBLOOM: I feel that what was done was an official statement was prepared and it was filed with the Court of Appeals. The allegations are that these are the identical statements that were in presumably—

"THE COURT: I mean, the manner in which it came to the attention of the editor, in your opinion, makes no difference?

"MR. GOLDBLOOM: No, Your Honor, not in the context of this case.

"THE COURT: All right.

"MR. GOLDBLOOM: Because, they are the same statements that were placed on file, using the plaintiff's argument, they are the same statements which were ultimately placed on file in the official statement in the 10th Circuit.

"THE COURT: Now, you have used a word there that I have been wondering whether you would use the word. You say the same words that were in a document were ultimately filed in the Court of Appeals. You mean, filed subsequent to the delivery of this to the newspaper editor?"

The question of the effect of the Tenth Circuit's denial of the Motion to Strike and its relevance to the subsequent libel suit was also considered by Judge Austin, as the following colloquy illustrates:

"MR. GOLDBLOOM: My statement is that subsequent to the filing of the official statement in the Court of Appeals by the 10th Circuit, the plaintiff or the appellant in the 10th Circuit, [O'Bryan] filed a motion to strike the official statement, which in effect reiterated this allegation that the official statement was not proper, properly a brief, to be filed in the Court of Appeals for the 10th Circuit.

"THE COURT: I fail to see any notation of that in the opinion.

"MR. GOLDBLOOM: That is correct, Your Honor. It is simply a matter of—

"THE COURT: And I am, I now ask you what the relevancy of that is, if true, I mean, are you telling me that the 10th Circuit has passed on this by not mentioning it in their opinion?

"MR. GOLDBLOOM: No, Your Honor, except by inferences, as we will get into, at some later stage of the argument.

* * * * * *

"THE COURT: Was the question before the 10th Circuit, whether it was within the performance of the Judge's duty to deliver something to a newspaper editor? Was that before—

"MR. GOLDBLOOM: No, Your Honor.

"THE COURT: Isn't that sort of the crux of this proceeding?

"MR. GOLDBLOOM: That is the crux of this proceeding.

"THE COURT: I mean, so, it wasn't passed on."

Several other illustrative examples could be given, but only one is necessary to show clearly that Judge Austin explicitly considered and passed on the question of whether the actions complained of in the libel suit were a neces-

sary part of the defense in the prior malicious prosecution suit:

"MR. GOLDBLOOM: What we say, Your Honor, is that the action taken by the defendant in allowing the brief or official statement to be given to the witness [the newspaper editor] was a part of his filing of the official statement in Denver.

"THE COURT: I know that is your position and we solve that by saying I disagree with your position so we know exactly where we stand in regard to this."

We must conclude on the basis of this record that all matters considered and passed upon by Judge Battisti in the declaratory judgment action had previously been considered and passed upon by Judge Austin in the removal hearing in the State libel action. These issues have also been raised and passed upon in the State court libel action, which is still pending. The effect of this conclusion will be considered in later parts of this opinion.

C. *Jurisdictional Grounds for the Declaratory Judgment Action.*

[1] Appellant O'Bryan contends, correctly, that the Declaratory Judgment Act, 28 U.S.C. § 2201,[7] is not a jurisdictional statute, but is remedial only; any jurisdiction over the controversy must be found in other statutes conferring jurisdiction. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671, 70 S.Ct. 876, 94 L.Ed. 1194 (1950). He further argues that no independent jurisdiction exists in this case.

Judge Chandler argues, on the other hand, that jurisdiction exists under 28 U.S.C. § 1331[8] by virtue of a federal question. As noted above, there are three separate grounds alleged as the basis of the federal question. We examine each of them.

First of all, it is contended that the judgment is necessary to protect and effectuate the judgment in O'Bryan v. Chandler, 352 F.2d 987 (10th Cir. 1965). This is the ground relied on by the court below, and is one of the specific exceptions to 28 U.S.C. § 2283 which otherwise prohibits the enjoining of state court proceedings. In considering this contention, we must keep in mind the admonition of the Supreme Court that

"* * * the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 287, 90 S.Ct. 1739, 1743, 26 L.Ed.2d 234 (1970).

Our review of the record in the malicious prosecution litigation, which has been made a part of the record in the present suit, leads us to the conclusion that the issues involved in the instant suit were not raised and litigated in the prior suit, and indeed could not have been. Therefore, they could not have been precluded by the judgment in that suit.

7. 28 U.S.C. § 2201 provides as follows:
"In a case of actual controversy within its *jurisdiction*, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." (emphasis added).

8. 28 U.S.C. § 1331(a) provides as follows:
"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest or costs, and arises under the Constitution, laws, or treaties of the United States."
Neither party to this appeal has suggested that there is any problem with the jurisdictional amount. Presumably the protection afforded Judge Chandler against enforcement of the $50,000 state libel judgment satisfies this requirement.

Briefly stated, the issues involved in the instant suit which could not have been decided in the prior suit are as follows: (1) Was the "tan brief" the same document as the "blue brief" which was filed in the malicious prosecution suit? This question could not have been passed upon for the reason that the existence of the "tan brief" was unknown to the Tenth Circuit either at the time it ruled on the Motion to Strike or rendered its final decision. (2) Was the delivery of the "tan brief" to the newspaper editor prior to the filing of the "blue brief" an act in defense of the malicious prosecution suit? This question could also not have been passed upon for the same reason that the conduct was unknown at the time the decision was rendered. (3) Assuming that the act of delivering the "tan brief" to the newspaper editor was an act in defense of the malicious prosecution suit, was it clothed with judicial immunity? Obviously this question could not have been passed upon for the same reasons.

[2] This statement of the issues makes evident the conclusion that the cause of action in the present libel suit is separate and distinct from the cause of action in the malicious prosecution suit. There the alleged cause of action arose out of Judge Chandler's conduct in relation to the grand jury proceedings which resulted in the indictment of O'Bryan. Here the libel action arises out of Judge Chandler's conduct in delivering allegedly libelous statements to a newspaper editor, conduct which occurred four years later. The judgment in that case could not possibly have covered the issues in the instant case, and therefore the declaratory judgment action cannot be justified as necessary to protect and effectuate the prior federal judgment.

[3] The second argument made in support of federal jurisdiction is that the question of Judge Chandler's immunity from the libel suit is a federal question, thus conveying jurisdiction under § 1331. It is true that the immunity issue is a federal question, Howard v. Lyons, 360 U.S. 593, 597, 79 S.Ct. 1331, 3 L.Ed.2d 1454 (1959), but it is in the nature of a federal defense to a suit instituted under state law. As such, it is not sufficient to convey *original* jurisdiction on a federal court.

[4] It is an established principle that federal jurisdiction based on a federal question must appear from a plaintiff's "well-pleaded complaint" and that anticipation in the complaint of a federal defense, where the plaintiff's basic cause of action is grounded only on state law, will not suffice to establish original federal jurisdiction. 1 Barron & Holtzoff, Federal Practice and Procedure § 25, pp. 124–126 (Wright ed. 1960), and cases therein cited. Thus, it is clear that the federal court would not have had original jurisdiction over O'Bryan's libel suit, which of course was based solely on state libel laws. Martin v. Wyzanski, 262 F. Supp. 925 (D.Mass.1967); Keppleman v. Upston, 84 F.Supp. 478 (N.D.Cal.1949); Pendleton v. Bussey, 30 F.Supp. 211 (W.D.Va.1939).

The question here, however, is slightly different, in that the declaratory-plaintiff Chandler seeks to have established his federal right of judicial immunity. However, we think this position is foreclosed by the Supreme Court's decision in Public Service Commission v. Wycoff Co., 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952). The Court's language there is directly in point in the instant case:

> "Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, *it is the character of the threatened action, and not of the defense*, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, *if that right is in reality in the nature of a defense to a threatened cause of*

action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." 314 U.S. at 248, 62 S.Ct. at 242 (emphasis added).

See also, Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S.Ct. 876 (1950); First Federal S. & L. Assoc. v. McReynolds, 297 F.Supp. 1159 (W.D. Ky.1969); Government Employees Ins. Co. v. LeBleu, 272 F.Supp. 421 (E.D.La. 1967).

[5] This principle has direct applicability to the present case. O'Bryan's cause of action is solely based on state libel laws, and in no way raises a federal question in and of itself. Judge Chandler's assertion of judicial immunity is "in reality in the nature of a defense" to that suit. Therefore, it does not confer original federal question jurisdiction in the declaratory judgment action. The application of this principle is particularly apposite in the present case where the state court action is not merely threatened, but has actually been instituted and carried to judgment. The effect of the declaratory judgment here was to "seize litigations from state courts," a purpose not within the declaratory judgment act. Brillhart v. Excess Ins. Co., 316 U.S. 491, 495, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942); Shell Oil Co. v. Frusetta, 290 F.2d 689 (9th Cir. 1961).

[6] The final basis urged for federal jurisdiction is that the action is in the nature of a "bill of peace" to protect Judge Chandler from harassing and vexatious lawsuits which have prevented him from performing his functions as a federal judge. This appears to be a rather unique contention, and no authority is cited to support it. We do not feel it can be sustained in the circumstances of this case, for several reasons.

In the first place, we have some doubt that a federal judge has standing as a plaintiff, either in his private or official capacity, to bring a suit enjoining others from litigating against him, at least where the underlying merits of the suit have not yet been determined in his favor. There is no doubt of course that a federal court has the power to enjoin harassing and vexatious litigation in the appropriate circumstances. *See, e. g.*, Meredith v. John Deere Plow Co., 261 F.2d 121 (8th Cir. 1958), *cert. denied*, 359 U.S. 909, 79 S.Ct. 586, 3 L.Ed.2d 574 (1959); 600 California Corp. v. Harjean, 246 F.Supp. 843 (N.D.Tex.1968); Rudnicki v. McCormack, 210 F.Supp. 905 (D.R.I.1962), *app. dismissed*, 372 U.S. 226, 83 S.Ct. 679, 9 L.Ed.2d 714 (1963). But these circumstances ordinarily arise only when the parties are otherwise properly before the court on an underlying cause of action within the court's jurisdiction, and that cause of action has been determined in favor of the party seeking the injunction. Pacific Mutual Life Ins. Co. v. Parker, 71 F.2d 872, 876 (4th Cir. 1934); New York Life Ins. Co. v. Marshall, 26 F.2d 225, 226 (5th Cir.), *cert. denied*, 277 U.S. 587, 48 S.Ct. 434, 72 L.Ed. 1001 (1928); 43 C.J.S. Injunctions § 38(i). In the present suit, however, there is no underlying cause of action within the court's jurisdiction, and there has been no determination in Judge Chandler's favor on the merits of the libel suit.

Assuming however that there is standing to seek the injunction we do not think that the irreparable injury necessary to support its issuance has been shown. Judge Chandler alleges that O'Bryan's suits have prevented him from performing his duties as a federal judge. Apart from its repeated assertion, there is no showing in the record that these suits have interfered with his judicial functioning. In considering this issue, we must disregard the litigation relating to the disbarment proceedings, for these various attempts by O'Bryan to obtain reinstatement involved no personal interest or liability on the part of Judge Chandler. Regardless of the merits of O'Bryan's complaints as to his disbar-

ment, as to which we of course express no opinion, it is at least understandable that he would attempt to get it set aside. Judge Chandler's official functioning could not be interfered with by these attempts, other than perhaps ultimately to have his ruling reversed. But judges' rulings, at both the trial and appellate levels, are frequently reversed and this is but one of the hazards of the judicial occupation.

As to the personal suits against Judge Chandler, it would not appear that they are of the type which should be enjoined by a "bill of peace."

> "To entitle plaintiff to maintain its suit in the nature of a bill of peace, there must be involved an identity of issues. The actions, the multiplicity of which plaintiff seeks to enjoin, must all be based upon the same questions of law so that the decision of one will be practically determinative of all." New York Life Ins. Co. v. Stoner, 92 F.2d 845, 848 (8th Cir. 1937).

As was demonstrated above, there is no identity of issues between the malicious prosecution suit and the presently pending libel action.

Thus we conclude that there was no federal jurisdiction of the declaratory judgment action, and the judgment would have to be reversed on those grounds alone. However, even assuming that sufficient jurisdiction had been shown, we think the order must be reversed for the reason that it was an improper interference with the State court's jurisdiction.

D. Interference of the Declaratory Judgment with State Court Jurisdiction of the Libel Suit.

[7-9] Under the provisions of 28 U.S.C. § 1447(d) an order remanding a removed case to a state court is not reviewable. This provision establishes the Congressional policy of "not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." United States v. Rice, 327 U.S. 742, 751, 66 S.Ct. 835, 839, 90 L.Ed. 982 (1946). This policy cannot be avoided by invoking the provisions of the declaratory judgment act in a case which has been remanded to a state court. H. J. Heinz Co. v. Owens, 189 F.2d 505 (9th Cir. 1951), *cert. denied*, 342 U.S. 905, 72 S.Ct. 294, 96 L.Ed. 677 (1942). Thus, *so far as the question of a forum* in which a cause is to be litigated is concerned, the determination of a federal district court that a case is not removable and remanding it to a state court is final. Missouri Pac. Ry. Co. v. Fitzgerald, 160 U.S. 556, 583, 16 S.Ct. 389, 40 L.Ed. 536 (1896).

[10, 11] Therefore, since Judge Austin considered all the questions raised in the court below in his hearing of the removal of the libel suit, and since he determined that the case should be remanded for trial in the State court, that decision is *res judicata* as to any further attempts to litigate the same issues in a federal court. In saying that Judge Austin's decision is *res judicata*, we mean only that it is determinative of the issue of the forum. It is of course not finally determinative of the merits of the federal defense; but that defense must be litigated in the state courts, and thence through the appropriate appellate channels, ultimately to the Supreme Court if necessary. As noted by the Supreme Court in *the Missouri Pacific Railway case, supra*, the policy of finality in remand orders is equally applicable in federal question cases:

> "* * * [A]s to applications for removal on the ground that the cause arose under the constitution, laws or treaties of the United States, * * * this finality was equally expedient as questions of the latter character if decided against the claimant would be open to revision under section 709, [writ of error to the Supreme Court], *irrespective of the ruling of the circuit court in that regard in the matter of removal.*
>
> "It must be remembered that when Federal questions arise in causes pending in the state courts, those courts are perfectly competent to decide them,

and it is their duty to do so." 160 U.S. at 583, 16 S.Ct. at 396 (emphasis added).

[12, 13] Judge Chandler argues that, despite Judge Austin's remand order, the State court had no jurisdiction of the suit. We cannot agree with this contention. The State court is not ousted of jurisdiction merely because Judge Chandler's defense is a federal question. The state court has not only the right, but the duty to entertain that question. Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947). Nor does the fact that Judge Chandler has a right of removal divest the State court of jurisdiction, once that question has been determined against him and the case has been remanded to the State court. United States v. Rice, 327 U.S. 742, 749, 66 S.Ct. 835, 90 L.Ed. 982 (1946); Metropolitan Casualty Co. v. Stevens, 312 U.S. 563, 61 S.Ct. 715, 85 L.Ed. 1044 (1941); Missouri Pac. Ry. Co. v. Fitzgerald, *supra*.

[14-16] It follows from what we have said that, since the State court had jurisdiction of the libel suit, and since Judge Austin's order of remand is *res judicata* as to any further litigation of this subject matter in the federal court, and since the instant suit does not fall within any of the exceptions to 28 U.S.C. § 2283, the injunction against further proceedings in the state libel suit was improper. Mere apprehension that the state court will not adequately protect a federal right is not a sufficient basis for the issuance of the injunction.

"* * * [D]uring more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions. During that entire period, the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts." Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 518, 75 S.Ct. 452, 456, 99 L.Ed. 600 (1955) (footnote omitted).

Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739 (1970). And where an injunction is improper under § 2283, declaratory relief should not be given. Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971).

Appellant O'Bryan, in addition to urging reversal of the judgment in the declaratory judgment action, requests us to enter an order requiring remand of the second removal of the libel suit to the State court. Since this matter is still pending in the trial court and has not been finally acted upon, we do not feel that we have jurisdiction to grant this relief. We assume that any further action taken in this matter will be in conformity with the views expressed in this opinion.

In summary, we recognize this time-consuming, energy-absorbing and costly litigation has been abrasive to both parties and without expressing any opinion on the merits, we feel that Judge Chandler's defense can only, in view of Judge Austin's decision in the first removal proceeding, be presented in the State court with a right of review in the Oklahoma Supreme Court and thence, if desired, presented via certiorari to the United States Supreme Court.[9] The decision on the merits, including, inter alia,

9. As noted by the Supreme Court in Public Service Commission v. Wycoff, *supra*, "State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right." 344 U.S. at 247-248, 73 S.Ct. at 242.

the related issue of judicial immunity is not for our determination. We lack jurisdiction over the subject matter.

The judgment appealed from must be reversed and remanded with directions to dissolve the injunction and dismiss the complaint.

APPENDIX B

JULY TERM–SEPTEMBER 9, 1971

Before Honorable Martin D. Van Oosterhout, Honorable Pat Mehaffy and Honorable Floyd R. Gibson, Circuit Judges of the Eighth Circuit.

STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,	)	
Plaintiff-Appellee	)	
v.	)	No. 354-70
WILLIAM H. PAT O'BRYAN,	)	
Defendant-Appellant.	)	

Upon consideration of petition of appellee for rehearing, it is ordered that said petition be and is denied.

APPENDIX C

SEPTEMBER TERM - NOVEMBER 12, 1971

Before Honorable Martin D. Van Oosterhout, Honorable Pat Mehaffy and Honorable Floyd R. Gibson, Circuit Judges of the Eighth Circuit.

STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma, Plaintiff-Appellee,	)	
v.	)	No. 354-70
WILLIAM H. PAT O'BRYAN, Defendant-Appellant.	)	

Upon consideration of motion of appellee for stay of issuance of mandate, it is ordered that issuance of mandate is stayed to and including December 8, 1971, pending certiorari.

APPENDIX D

FRIDAY, DECEMBER 3, 1971
ORDER IN PENDING CASE

No. A-577 STEPHEN S. CHANDLER, U.S. DIST. JUDGE FOR WESTERN DIST. OF OKLAHOMA v. WILLIAM H. PAT O'BRYAN

The application for extension of time to file a petition for writ of certiorari and stay of mandate presented to Mr. Justice White and by him referred to the Court, is granted, and it is ordered that the time for filing a petition for a writ of certiorari be extended, and the mandate of the United States Court of Appeals for the Tenth Circuit be stayed, until January 7, 1972. If the petition for writ of certiorari be filed on or before January 7, 1972, then the mandate is further stayed pending the disposition of the petition for writ of certiorari.

Mr. Justice Marshall took no part in the consideration or decision of this application.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

STEPHEN S. CHANDLER,)
Plaintiff)
)
v.) No. C 68-26
)
W. H. (PAT) O'BRYAN,)
Defendant)

[Filed Jun. 12, 1969]

MEMORANDUM OPINION

Battisti, J.

On May 22, 1969, O'Bryan's motion to dismiss Chandler's declaratory judgment action was ordered overruled. This opinion embodies the reasoning supporting that order.

The plaintiff in this declaratory judgment action is Stephen S. Chandler, United States District Judge for the Western District of Oklahoma. He brings this action in the nature of a Bill of Peace to enjoin allegedly groundless present, past, and future actions by O'Bryan designed to frustrate and interfere with Chandler's judicial functioning; and to protect and effectuate a judgment of judicial immunity in a malicious prosecution case against plaintiff, *O'Bryan v. Chandler*, 249 F. Supp. 51 (1964), *aff'd* 352 F.2d 987 (10th Cir. 1965), *cert. den.* 384 U.S. 926 (1965), *reh. den.* 385 U.S. 889 (1966).

The facts as alleged by the plaintiff, and taken as true for purposes of this motion to dismiss, are as follows:

1. In 1963 O'Bryan brought an action against Judge Chandler in an Oklahoma state court for malicious prosecution and libel and slander arising from certain testimony of Judge Chandler before a grand jury, which resulted in a

criminal indictment against O'Bryan. The case was removed to the United States District Court for the Western District of Oklahoma.

2. The United States District Court dismissed O'Bryan's complaint on grounds of judicial immunity.

3. In an affidavit filed by O'Bryan in support of various post-trial motions in the District Court, which were denied, O'Bryan accused Judge Chandler of scandalous acts in connection with his handling of the Chapter X proceedings of the Selected Investments Corporation. These accusations received wide publicity.

4. O'Bryan appealed to the United States Court of Appeals for the Tenth Circuit.

5. Over O'Bryan's objection, and with leave of the Court of Appeals, Chandler on August 18, 1965, filed a personal statement as a brief in defense of O'Bryan's accusations.

6. Judge Chandler made a draft of this statement available to a Mr. Clabes, managing editor of the *Oklahoma Journal* on August 15, 1965, in order to assure prompt and accurate news coverage of this statement.

7. In November, 1965, the Court of Appeals affirmed the judgment of the District Court for Judge Chandler on grounds of judicial immunity. *O'Bryan v. Chandler, supra.*

8. In December, 1965, O'Bryan commenced a libel action against Judge Chandler in the Oklahoma state courts based on the statement made available to Clabes.

9. Judge Chandler removed the case, but Judge Austin, sitting by assignment in the United States District Court, granted O'Bryan's motion to remand.

10. After trial in the Oklahoma state court, Judge Chandler again removed to this Court, and again O'Bryan moved for remand.

11. This remand is presently before the Court in Civil Action No. 67-88, as a companion case to this declaratory judgment action, which was filed by Judge Chandler subsequent to the second removal.

Four principal issues are presented by O'Bryan's motion to dismiss the declaratory judgment action: (1) whether there is "federal question" jurisdiction under 28 U.S.C.A., §1331; (2) whether this Court in the exercise of its discretion should take such jurisdiction; (3) whether hearing the declaratory judgment would violate 28 U.S.C.A., §2283, pursuant to which federal courts generally will not interfere with matters pending in state courts; and (4) whether entertaining the declaratory judgment action would amount to an indirect appeal of Judge Austin's remand order, prohibited by 28 U.S.C.A., §1447(d).

As to the jurisdiction of the federal court, there can be no dispute that whether the judgment of the United States Court of Appeals is violated by the subsequent libel action against Judge Chandler in the Oklahoma state courts presents a federal question. Secondly, if, as Judge Chandler alleges, the lawsuits brought by O'Bryan seek damages for official acts performed by Chandler as a United States District Judge, a federal question is also clearly presented. Certainly a determination as to whether Judge Chandler's conduct falls within the perimeter of the judicial immunity which attaches to the official conduct of a federal judge is a federal question.

Counsel for O'Bryan has argued that the order previously issued by the federal court enjoining O'Bryan from pursuing his libel action, and any further order to the same effect is, and would be, a violation of 28 U.S.C.A., §2283. That statute states: "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

At the outset, it should be noted that O'Bryan is correct in one respect: That this statute cannot be avoided by framing an order against the litigant, O'Bryan, in lieu of ordering the state court itself to suspend its proceedings. *Oklahoma Packing Co. v. Oklahoma Gas & Elect.*, 309 U.S. 4 (1940).

However, if plaintiff can prove the allegations set forth in his pleadings and briefs, Chandler's declaratory judgment action would appear to fit within at least two of the three exceptions to Section 2283. More specifically, 2283 does permit federal courts to stay proceedings "to protect or effectuate its judgments." In other words, 2283 would not bar an injunction if it is demonstrated that O'Bryan's present libel action must be dismissed in order to make effective the Court of Appeals judgment in *O'Bryan v. Chandler, supra*. For a United States Court to do otherwise would allow a party to relitigate in a state court a matter previously determined by a federal court. 4A *Moore's Fed. Pract.*, ¶ 0.208 [3-3]. See, *Amalgamated Clothing Workers v. Richmond Bros. Co.*, 348 U.S. 51 (1955).

Another exception to 2283 is a federal court staying state proceedings "where necessary in aid of its jurisdiction." According to Professor Moore: ". . . A well settled doctrine has existed that a federal district court has the power to enjoin the continued prosecution or the fomenting of vexatious and groundless proceedings, or where there is a multiplicity of suits and such suits are in the furtherance of a fraudulent scheme against the defendant or otherwise inequitable and result in irreparable harm and injury to him . . ." 1A *Moore's Fed. Pract.*, ¶ 0.227. See, *Sovereign Camp. Woodmen of the World v. O'Neil*, 266 U.S. 292 (1924). This doctrine appears to fit the thrust of Judge Chandler's prayer for a Bill of Peace, which claims that O'Bryan's present libel action is one of a series of groundless lawsuits. Thus, 2283 does not stand in the way of an order staying the libel action against Judge Chandler.

Doubtless it may be argued that this declaratory judgment action should be construed as a review of Judge Austin's remand order, in contravention of 28 U.S.C.A. § 1447(d). This statute requires, in essence, that a remand order is not reviewable by appeal or otherwise. It cannot be overemphasized that this is not the case.

The issue in the libel action before Judge Austin appears to be a rather narrow one; that is, was Judge Chandler's act of making available to Clabes the so-called "yellow brief" an official act protected by judicial immunity. The two crucial issues in the declaratory judgment action are both broader than and distinguishable from the issue presented to Judge Austin. First, the declaratory judgment action raises whether all of Judge Chandler's actions which could be construed as part of his defense of the malicious prosecution action in the Court of Appeals should merge with the final judgment of judicial immunity in that Court. Secondly, the declaratory judgment action is brought as a Bill of Peace. This aspect of the declaratory judgment actions brings into play the whole panoply of legal actions involving Chandler and O'Bryan commencing with Judge Chandler's disallowance of O'Bryan's claim for attorneys' fees in the "Selected Investment" case, 260 F.2d 918 (10th Cir. 1958); O'Bryan's disbarment; Judge Chandler's conduct before the grand jury; O'Bryan's malicious prosecution and libel action in the state courts, the District Court and the Court of Appeals; O'Bryan's second libel action; and any future litigation which might emerge from the foregoing transactions and history. Clearly, the Bill of Peace aspect of the declaratory judgment action is both separate and broader in scope than the issues presented on remand.

Moreover, the policy behind 1447(d) would not appear to be subverted by this declaratory judgment. Briefly stated, that policy is to avoid interruption of litigation of the merits of a removed case by a prolonged litigation of questions of the jurisdiction of the federal court. 1A *Moore's Fed. Pract.* ¶0.169 [2-1]. *Application of Rosenthal-Block China Corp.*, 278 F.2d 713 (2nd Cir. 1960). Rarely are questions that are so obviously a matter of federal jurisdiction presented as (1) the scope of a judgment of the United States Court of Appeals, which in turn is grounded on a clear question of federal law; and (2) whether a federal judge is entitled to protection under the doctrine of judicial immunity from

a series of legal actions allegedly brought to prevent him from performing his judicial functions.

The only remaining issue is the very crucial problem of whether the Court in its discretion should choose to exercise its jurisdiction to hear the declaratory judgment action.

At the outset, two preliminary matters should be met. First, there can be no dispute that the parties are sufficiently adverse and come with a concrete and justiciable controversy adequate to satisfy the requirements of the Declaratory Judgment Act. Secondly, the mere pendency of the libel action in the state court is not controlling of the federal court's discretion to hear a declaratory judgment action filed subsequently: *Brillhart v. Excess Ins.*, 316 U.S. 491 (1942); *Aetna Cas. & Surety Co. v. Quarles*, 92 F.2d 321 (1937); 6A *Moore's Fed. Pract.*, ¶ 57.28 and ¶ 59.08(6).

Several factors have led the Court to exercise its discretion to take jurisdiction of the declaratory judgment:

1. As noted earlier, the issues in O'Bryan's second libel action are not the same or identical to the issues presented in the declaratory judgment action. See *Provident Tradesmen Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).

2. The cases cited by O'Bryan which decline jurisdiction refer primarily to controversies revolving around state law which naturally move a federal court to act somewhat cautiously; whereas the issues in this declaratory judgment action are purely matters of federal law which should properly be determined by a federal court with a full evidentiary trial.

3. Being a remedial statute, the Declaratory Judgment Act should be liberally construed. 6A *Moore's Fed. Pract.*, ¶ 57.09 and *Sears Roebuck Co. v. American Mutual Liability Ins. Co.*, 372 F.2d 435 (7th Cir. 1967); *Ohio Casualty Ins. Co. v. Marr*, 98 F.2d 973 (1938).

4. Judge Chandler is seeking relief from the uncertainty of a series of legal proceedings and personal attacks brought by O'Bryan which are allegedly groundless. If these allega-

Stephen S. CHANDLER, Plaintiff,

v.

W. H. Pat O'BRYAN, Defendant.

No. C 68-28.

United States District Court,
W. D. Oklahoma.

April 23, 1969. [1970]

Action for declaratory judgment that publishing of statements in certain document was merged with conduct adjudged by Court of Appeals in another case to be judicially immune. The plaintiff moved for summary judgment. The District Court, Battisti, J., held that where court of appeals denied motion to strike document and subsequently found that there could be no recovery in libel

action because of judicial immunity, such immunity extended to all matters connected with proceeding and known to the court, and the document, a draft copy of which was furnished to newspaper before decision of court of appeals, was also clothed with judicial immunity and furnishing of draft was protected from liability.

Plaintiff's motion for summary judgment granted and mandatory injunction issued.

1. Federal Civil Procedure ⇐2544

On plaintiff's motion for summary judgment, plaintiff has affirmative burden of showing absence of any genuine issue as to all material facts which entitle him to judgment as matter of law. Fed.Rules Civ.Proc. rules 56, 56(c), 28 U.S.C.A.

2. Federal Civil Procedure ⇐2544

Party moving for summary judgment must sustain his burden of showing absence of any genuine issue as all material facts which entitle him to judgment as matter of law by facts at which court will take judicial notice. Fed. Rules Civ.Proc. rules 56, 56(c), 28 U.S. C.A.

3. Evidence ⇐43(1)

Court may take judicial notice of its records and files.

4. Evidence ⇐43(1)

District court took judicial notice of entire record before it in two civil actions, of information useful to analysis of issues in a third case, of another case in state court and of records and proceedings in two federal cases involving same parties and concerning matters relevant to and leading to issues involved in case before court.

5. Federal Civil Procedure ⇐2462

Function of summary judgment procedure is to avoid a useless trial. Fed.Rules Civ.Proc. rules 56, 56(c), 28 U.S.C.A.

6. Libel and Slander ⇐38(1)

Where court of appeals denied motion to strike document and subsequently found that there could be no recovery in libel action because of judicial immunity, such immunity extended to all matters connected with proceeding and known to the court, and the document, a draft copy of which was furnished to newspaper before decision of court of appeals, was also clothed with judicial immunity and furnishing of draft was protected from liability.

Carl L. Shipley, Washington, D. C., for plaintiff.

Irwin Goldbloom, Dept. of Justice, Washington, D. C., as amicus curiae.

Reagan M. Martin and Harvey L. Davis, Dallas, Tex., for defendant.

MEMORANDUM OPINION AND ORDER

BATTISTI, District Judge.

Plaintiff moved for summary judgment of his declaratory judgment action, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on August 12, 1969. Briefs were filed and a hearing was convened on February 27, 1970, to consider defendant's objections that there are material factual disputes which bar a rendering of judgment on this motion under Rule 56(c).

[1-4] A motion for summary judgment shall be granted if the moving party shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), F.R. Civ.P. Plaintiff has the affirmative burden of showing the absence of any genuine issue as to all the material facts which entitle him to judgment as a matter of law. 2 Moore's Federal Practice 56.15[3]. The moving party must sustain his burden by facts of which the Court will take judicial notice, and the Court may take judicial notice of its records and files. 2 Moore's Federal Practice 56.11[9]. The Court, therefore, takes judicial notice of the entire

record before this Court in Civil Action No. 67-83 and in No. 68-26; of information useful to analysis of the issues in this case in Civil Action No. 66-8; of Case No. 170-787 in the Oklahoma state court; and of the records and proceedings in D. C., 249 F.Supp. 51 and 10 Cir., 352 F.2d 987 which involved the same parties and concerned matters relevant to and leading to the issues involved in the present case. The Court also has the benefit of pleadings, affidavits, and oral testimony.

Whether the evidence reveals that a genuine issue of fact exists depends on the legal question presented. The precise legal issue in the present action can be fully understood only in the context of the complete factual background.

Plaintiff is a duly appointed United States District Judge for the Western District of Oklahoma. Defendant is an Oklahoma attorney and certified public accountant. They have been in litigation for literally a decade. On September 25, 1963, O'Bryan filed suit in the District Court of Oklahoma County against Judge Chandler, seeking damages for malicious prosecution, libel, and slander. The cause of action grew out of Judge Chandler's activities before a grand jury on November 9, 1961, which resulted in a criminal indictment against O'Bryan. The case was removed to Federal Court in No. 63-339, and O'Bryan's motion to remand was overruled. The Court found that Judge Chandler's activities were not beyond the scope of his jurisdiction as a district judge, and therefore he was judicially immune from civil liability. O'Bryan v. Chandler, 249 F.Supp. 51 (D.C., 1964). The Court ordered dismissal of the action in the state court.

O'Bryan appealed to the Tenth Circuit Court of Appeals. On November 30, 1965, the Tenth Circuit ruled to affirm the decision of the District Court. O'Bryan v. Chandler, 352 F.2d 987 (1965). The Court set forth the governing principles at page 988:

> "It is settled doctrine that a Judge is not liable in damages for acts performed in a judicial capacity unless there is a 'clear absence of all jurisdiction' over the subject matter. This is true, even though the Judge's acts are in excess of his jurisdiction and done maliciously, corruptly, or arbitrarily. Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646. This court, in Ryan v. Scoggin, 10 Cir., 245 F.2d 54, 58, announced the rules in these words:
>
> * * * 'It is only in instances in which a judge acts or proceeds in the clear absence of any color of jurisdiction or proceeds officially in respect to a cause or matter over which the court is clearly without any color of jurisdiction that he may be subjected to personal liability * * *.'"

The Court went on to discuss the judge's activities before the grand jury. It concluded: "We cannot agree with O'Bryan's contentions that Judge Chandler's conduct was clearly in absence of any jurisdiction * * *." *Id* at p. 989. For these acts "Judge Chandler could not be held liable in damages." *Id* at p. 990.

Shortly after the rendering of the Tenth Circuit's affirmance, on December 8, 1965, O'Bryan filed Case No. 170-787 in the District Court of Oklahoma County against Judge Chandler, seeking damages for an alleged libel committed by Judge Chandler against O'Bryan in the publication of a certain document. This document was prepared by Judge Chandler in connection with the matter pending before the Tenth Circuit Court of Appeals in August of 1965. Substantial portions of the document were thereafter contained in the judge's brief submitted to the Court of Appeals. However, O'Bryan alleged that Judge Chandler communicated this document, containing alleged defamatory matter, to Mr. John Clabes, an editor of an Oklahoma City newspaper, on August 15; the briefs were filed on August 13, 1965.

The question before the Court is precisely this: Should the actions of Judge Chandler in publishing the allegedly defamatory statements be merged into the subsequent holding of the Tenth Circuit Court of Appeals that the judge's conduct was judicially immune from civil liability? More particularly was the statement, in the context in which it was made, so intimately connected with the litigation concerning Judge Chandler's earlier conduct that it must be construed as an incidental part of that litigation. If so, the finding of judicial immunity by the Tenth Circuit may be construed to cover under its penumbra all acts which Judge Chandler undertook to win his litigation.

Before this issue can be faced squarely, it is necessary to take up the question of this Court's jurisdiction in this action. Such discussion should help to further highlight the preciseness of the question before the Court.

Judge Chandler removed Case No. 170-787 from the District Court of Oklahoma County on January 7, 1966, in Civil Action No. 66-8. O'Bryan filed a motion to remand to the state court. Judge Austin, sitting by assignment, heard the motions and granted O'Bryan's motion to remand on the ground that no federal question (judicial immunity) was presented. Whether his finding in this regard was correct is immaterial to the issue before this Court. After trial in the Oklahoma state court, which rendered a verdict against Judge Chandler, he again removed to this Court; and O'Bryan again moved for remand in Action No. 67-88. This motion to remand has been held in abeyance while plaintiff's motion for summary judgment of his action for declaratory judgment in the instant case No. 68-26 is considered.

In assuming jurisdiction of this action, the Court had to first grapple with two procedural obstacles. It was argued by defendant that the declaratory judgment action was a disguised attempt by plaintiff to obtain a review of Judge Austin's remand order, which review is prohibited by 28 U.S.C. § 1447(d). In a memorandum opinion of June 12, 1969, this Court decided that the declaratory judgment action should be construed as containing issues distinguishable from those before Judge Austin. In that libel action, Judge Austin examined the document in question with the view to determining whether it, in itself, was an official act protected by judicial immunity. This Court viewed the issue before it to be whether Judge Chandler's actions could be construed as part of his defense of the malicious prosecution action then before the Court of Appeals—as such, those actions could be said to merge with the final judgment of that court, covering all actions of Judge Chandler regarding the litigation.

The other question had to do with whether this Court would be violating 28 U.S.C. § 2283, which states: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." In other words, the declaratory judgment action must fit one of the three exceptions in Section 2283 to justify this Court in requiring the state court to expunge the judgment and issue a writ of prohibition against further proceedings. In the June 12, 1969, opinion, this Court ruled that hearing this declaratory judgment action could be necessary "to protect or effectuate" the judgment of the United States Court of Appeals.

Finally, this Court found jurisdiction under 28 U.S.C. § 1331 in that federal questions were presented as to whether a United States Court of Appeals' judgment is violated by the subsequent libel action, and whether Judge Chandler's actions are part of the official conduct of a federal judge in defending the malicious prosecution action. In view of all these factors, the Court decided to exercise its discretion to take jurisdiction.

The precise question in this controversy is whether Judge Chandler's conduct, in publishing the allegedly libelous statement, was merged with the conduct adjudged by the Tenth Circuit Court of Appeals to be judicially immune.

[5] The function of a summary judgment procedure is to avoid a useless trial. 2 Moore's Federal Practice 56.15[1.-0]. This Court is unable to find any material factual questions which necessitate a trial. The facts which are material to this controversy are plain and uncontroverted. They are:

(1) Following the dismissal of O'Bryan's complaint in the United States District Court in O'Bryan v. Chandler, D.C., 249 F.Supp. 51, O'Bryan appealed to the Court of Appeals for the Tenth Circuit.

(2) O'Bryan sought leave to file an amended complaint in the District Court, permission for which was refused. (Amended Petition, Tr. of Record, O'Bryan v. Chandler, Number 7907 Court of Appeals, p. 55-74). O'Bryan's appeal included the amended petition. The Court of Appeals in its opinion expressly approved the District Court's refusal to permit the filing of the amended complaint, O'Bryan v. Chandler, 10 Cir., 352 F.2d 987 at 991 (1965). The Court found it to contain "extraneous matter interposed with scandalous and scurrilous statements [concerning Judge Chandler]." *Id* at p. 990.

(3) While the appeal was pending, on August 18, 1965, Judge Chandler, with leave of the Court of Appeals, filed a brief or statement in the action. The brief or statement was entitled "Official Statement of Judge Chandler."

(4) O'Bryan moved to strike the Official Statement on the grounds that it was not in the nature of a brief. On September 16, 1965, the Court of Appeals entered an order denying the motion to strike. The document was, accordingly, entered into the record of the judicial proceedings before the Court of Appeals.

(5) The document in controversy is a supposed draft of the "Official Statement of Judge Chandler" which he made available to a Mr. Clabes, Editor of an Oklahoma newspaper, on August 15, 1965. It is this factor which, defendant herein O'Bryan contends, raises numerous material factual issues. O'Bryan argues that a material aspect is Judge Chandler's motive and intent in giving a draft of his statement to Mr. Clabes on August 15, 1965. Defendant argues that it is germane whether the statement is a brief, or an intentionally libelous document, or an attempted defense against O'Bryan's statements in his amended complaint. In view of the following findings, it will be seen that these questions are immaterial.

(6) The allegedly defamatory matter contained in the draft statement was also contained, for purposes of this case, in identical language on pages 17 and 18 of the Official Statement which was filed in the Court of Appeals.

(7) The conduct of Judge Chandler and Mr. Clabes on August 15, 1965, was solely and directly related to the preparation and filing by Judge Chandler of his Official Statement.

There is no genuine issue of material fact present in this controversy. The moving party has established this clear absence to the satisfaction of the Court. The opposing party has suggested factual disputes which this Court finds neither material nor of a substantial nature. United States v. United States Gypsum Co., 340 U.S. 76, 71 S.Ct. 160, 95 L.Ed. 89 (1950). The issue before the Court is not Judge Chandler's intent, nor is it whether the statement was defamatory. The issue is whether the conduct of Judge Chandler was so connected to his defense of the litigation before the Court of Appeals that it was merged with the conduct adjudged by that court to be immune.

[6] The Court is persuaded to the affirmative. When the Court of Appeals denied O'Bryan's motion to strike the Official Statement, the document became part of the judicial record. It must be conclusively presumed that the Court of Appeals considered the same. The finding of judicial immunity by the Court of Appeals must be held to extend to all matters connected with the proceeding and known to the Court. The conduct of Judge Chandler in furnishing a draft copy of the Official Statement is protected from liability since such acts were directly related to the subsequent filing in the Court of Appeals. Thus, this document was also clothed with judicial immunity.

Accordingly, plaintiff's motion for summary judgment is granted.

Pursuant to 28 U.S.C. § 2201, the Court declares that the acts complained of in O'Bryan v. Chandler, Case No. 170–787 in the District Court of Oklahoma County are judicially immune by virtue of the decision of the Court of Appeals in O'Bryan v. Chandler, 10 Cir., 352 F.2d 987 (1965). To protect and effectuate the judgment of the Tenth Circuit Court of Appeals, the state courts of Oklahoma are enjoined from further proceedings involving the same matters dealt with in the controversy before the Tenth Circuit Court of Appeals. The verdict in 170–787 is ordered expunged from the record and a writ of prohibition is ordered to be issued to that court against further proceedings.

A mandatory injunction shall issue to prohibit defendant O'Bryan from any further litigation with regard to the matters considered by the Tenth Circuit Court of Appeals. Defendant's motion to remand to the District Court of Oklahoma County will continue to be held in abeyance until appeals, if any, are exhausted.

Costs of the instant action are assessed against the defendant.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma, *Plaintiff*	)	
v.	)	No. 68-26-CIVIL
W. H. PAT O'BRYAN, *Defendant*	)	
W. H. PAT O'BRYAN, *Plaintiff*	)	
v.	)	No. 67-88-CIVIL
STEPHEN S. CHANDLER, *Defendant*	)	

[Filed May 4, 1970]

DECLARATORY JUDGMENT AND WRIT OF PROHIBITION

The Court hereby DECLARES and ADJUDGES that Stephen S. Chandler is judicially immune from liability for the acts complained of by W. H. Pat O'Bryan, the Plaintiff, in action entitled W. H. Pat O'Bryan v. Stephen S. Chandler, No. 170,787 in the District Court of Oklahoma County, Oklahoma and all acts performed by said Stephen S. Chandler in relation thereto, and

It is further ORDERED and ADJUDGED that said W. H. Pat O'Bryan is hereby ENJOINED and PROHIBITED from instituting or pursuing any further litigation with regard to the acts complained of by him in said action No. 170,787 in the District Court of Oklahoma County, Oklahoma and matters in relation thereto, and from instituting or pursuing any further proceedings involving the matters dealt with in the controversy before the United States Court of Appeals for the Tenth Circuit entitled *O'Bryan v. Chandler*, 352 F.2d 987 (1965) and matters in relation thereto.

Costs in action No. 68-26-Civil, as above captioned, are hereby assessed against the defendant, W. H. Pat O'Bryan, and judgment is hereby entered therefor.

It is further ORDERED, ADJUDGED and DECREED that the Motion to Remand to the District Court of Oklahoma County, Oklahoma, filed by the Plaintiff, W. H. Pat O'Bryan, in action No. 67-88-Civil, be and the same is hereby ORDERED held in abeyance until the appeals, if any, in action No. 68-26-Civil are exhausted.

Dated this 30th day of April, 1970.

/s/ Frank J. Battisti
CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, Assigned.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma, *Plaintiff*	)	
v.	)	No. 68-26-Civil
W. H. PAT O'BRYAN, *Defendant*	)	
W. H. PAT O'BRYAN, *Plaintiff*	)	
v.	)	No. 67-88-Civil
STEPHEN S. CHANDLER, *Defendant*	)	

THE UNITED STATES OF AMERICA

TO

THE STATE COURTS OF THE STATE OF OKLAHOMA, THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA AND LAVERN FISHEL, DISTRICT JUDGE

[Filed May 4, 1970]

WRIT OF MANDAMUS AND PROHIBITION

The state Courts of the State of Oklahoma, the District Court of Oklahoma County, Oklahoma, and Judge Lavern Fishel, District Judge are hereby

ORDERED to expunge from the record in action 170,787 entitled W. H. Pat O' Bryan v. Stephen S. Chandler, the verdict rendered by a jury in said action on the 25th day of February, 1967, and the purported Journal Entry of Judgment entered and filed therein on the 30th day of June, 1967, and are hereby

PROHIBITED and ENJOINED from proceeding further in said action and from entertaining further proceedings involving the matters dealt with in said action or related thereto and from entertaining further proceedings involving the matters dealt with in the controversy entitled *O'Bryan v. Chandler*, 352 F.2d 987 (1965) in the United States Court of Appeals for the Tenth Circuit or matters relating thereto.

Dated this 30th day of April, 1970.

/s/ Frank J. Battisti
CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, Assigned.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

W. H. PAT O'BRYAN,
Plaintiff,
v.
STEPHEN S. CHANDLER,
Defendant.

CASE NO. 67-88-Civil

[Filed September 25, 1967]

WRIT OF PROHIBITION

WHEREAS, Case numbered 170,787, pending in the District Court of Oklahoma County entitled as above has been legally removed to this Court, as authorized by Title 28 USC 1442,

NOW, THEREFORE, pursuant to the mandate of Title 28 USC 1446, THE DISTRICT COURT OF OKLAHOMA COUNTY and W. H. PAT O'BRYAN are hereby prohibited from proceeding further in said action in said Court "unless and until the case is remanded" to said Court and a certified copy of such an Order of Remand, filed with the Clerk of said Court, in the event such an Order of Remand should thereafter be entered by this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Journal Entry of Judgment entered and filed in State Court June 30, 1967 and the Order of September 22, 1967, setting Motion for New Trial for hearing were signed, entered and filed by the Honorable Lavern Fishel in violation of the laws of the United States and are null and void and of no legal force and effect whatever and the Honorable Lavern Fishel is hereby ordered to expunge same from the records of said court.

/s/ Frank J. Battisti
JUDGE

APPENDIX K

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

W. H. PAT O'BRYAN,
Plaintiff,
v.
STEPHEN S. CHANDLER,
Defendant.

No. 148355

DISMISSAL

COMES NOW, the Plaintiff in the above captioned and numbered cause; after the Plaintiff was furnished a copy of the alleged libelous publication, *but* it appeared from said publication that the Honorable Stephen S. Chandler did not say:

> "W.H. Pat O'Bryan did on or about the 24th day of March 1958 and on May 21, 1958, file a false and fraudulent claim, and amended claim, in the Federal Court for the Western District of the State of Oklahoma in the Matter of the Bankruptcy of Selected Investments Corporation and Selected Investments Trust Fund, Case No. 10680, wherein W. H. Pat O'Bryan asked the Court to grant him an attorney fee in a maximum sum of $1,194,027.02. That the said W. H. Pat O'Bryan had no claim whatsoever against the said bankrupt, but on the other hand manufactured the same out of the 'thin air'."

NOW, THEREFORE, Plaintiff dismisses this cause of action without prejudice.

/s/ W. H. Pat O'Bryan

vah:11-27-59

APPENDIX L

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

W. H. PAT O'BRYAN,

Petitioner,

v.

STEPHEN S. CHANDLER, Chief Judge of the United States District Court for the Western District of Oklahoma, and VERA L. HOWARD, Clerk of the United States District Court for the Western District of Oklahoma,

Respondents.

No. 7400

[Filed Sept. 13, 1963]

ON APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

The application to file a petition for mandamus is denied. Although petitioner, a lawyer, alleges that he has been disbarred by an order of the District Court for the Western District of Oklahoma, entered summarily, and without a hearing, a procedure prohibited under the principles set forth in Theard v. United States, 354 U.S. 278, 77 S. Ct. 1274; it is apparent that full relief is available to petitioner for redress of any such void judgment by customary procedures originating at the trial level.

DAVID T. LEWIS
U.S. Circuit Judge

DELMAS C. HILL
U.S. Circuit Judge

OLIVER SETH
U.S. Circuit Judge

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W. H. Pat O'BRYAN, Plaintiff,

v.

Stephen S. CHANDLER, Defendant.

Civ. No. 63-339.

United States District Court
W. D. Oklahoma.

July 1, 1964.

Action against a United States district judge for alleged malicious prosecution, libel and slander. On defendant's motion to dismiss, the District Court, Harper, J., held that defendant district judge's actions in going to grand jury room at request of grand jury, constituting grand jury room a courtroom and delivering remarks in which he mentioned by name defendant against whom subsequently dismissed indictment was thereafter returned were not so clearly beyond his jurisdiction as to form basis for his civil liability.

Complaint dismissed.

Judgment affirmed, D.C., 352 F.2d 987.

1. Federal Civil Procedure ⇐1772

To justify dismissal of complaint on motion it must appear as matter of law that under no state of facts which plaintiff could prove in support of claims pleaded would he be entitled to any relief.

2. Judges ⇐36

Judges are exempt from civil liability for acts done in exercise of judicial function.

3. Grand Jury ⇐1

A grand jury has no existence aside from court which calls it into existence and upon which it is attending.

4. Judges ⇐36

Actions of district judge in going to grand jury room at request of grand jury, constituting grand jury room a courtroom and delivering remarks in which he mentioned by name defendant against whom subsequently dismissed indictment was thereafter returned were not so clearly beyond his jurisdiction as to form basis for his civil liability on claims of malicious prosecution, libel and slander.

Sam Sullivan, Durant, Okl., Joseph Rarick, Norman, Okl., for plaintiff.

John H. Cantrell, Lynn J. Bullis, Oklahoma City, Okl., Granville Tomerlin, Floyd Rheam, Claude Rosenstein, Tulsa, Okl., for defendant.

HARPER, District Judge.

W. H. Pat O'Bryan, hereinafter referred to as plaintiff, filed suit on September 25, 1963, against the defendant, a United States District Judge for the Western District of Oklahoma, in the District Court of Oklahoma County, State of Oklahoma. The plaintiff's cause of action is in two counts. The first count seeks damages for malicious prosecution, libel and slander in the amount of $5,000,000.00 and the second count seeks an additional $5,000,000.00 as punitive damages. The suit was filed by the plaintiff after a criminal indictment which had been returned against the plaintiff by the grand jury in the Western District of Oklahoma had been dismissed.

The case was duly removed to the Federal Court and the plaintiff's motion to remand overruled. The case is now

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before the court on defendant's motions to strike, to state separately, and to dismiss, all having been presented to the court by very exhaustive briefs and lengthy oral argument. The court in this memorandum opinion and order will concern itself only with the defendant's motion to dismiss for failure to state a cause of action.

[1] Cases are legion wherein the appellate courts have dealt with the problem of attempts to terminate litigation believed to be without merit by dismissing a complaint for failure to state a cause of action, and the appellate courts generally agree that in order to justify such a dismissal by the trial court it must appear as a matter of law that under no state of facts which the plaintiff could prove in support of the claims pleaded would he be entitled to any relief. The Supreme Court in Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed. 2d 80, said:

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

[2] And so, with respect to the motion to dismiss we must examine the plaintiff's petition and consider it in the light of this accepted rule, but before doing so we must turn to the law with respect to the civil liability of judges in order to evaluate the petition under the accepted rule of law. The law has long been well settled that judges are exempt from civil liability for acts done by them in the exercise of their judicial function. Many, many decisions to this effect pertaining to judges and other public officials are reported. One of the early decisions of the Supreme Court, Bradley v. Fisher, 13 Wall 335, 357, 20 L.Ed. 646; discusses the matter in great detail. This case has repeatedly been cited by the courts and we, therefore, turn to it for guidance. At page 651 of 20 L.Ed. the court had this to say:

> "Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. * * * But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him. * * *"

And then, further:

> "The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts, existing when there is juris-

diction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into, judges would be subjected to the same vexatious litigations upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must in such cases resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed."

As expressed in the *Bradley* case, a judge is exempt from civil liability even when he acts in excess of his jurisdiction and such acts are done maliciously and with bad motives. The United States Supreme Court has expressed the policy that only when there is a clear absence of all jurisdiction over the subject-matter can a judge be held civilly liable. The court in Bradley v. Fisher distinguished between a judge acting in excess of jurisdiction and a judge acting in clear absence of all jurisdiction. Only in the latter situation is a judge's authority considered usurped authority.

A recent United States Supreme Court opinion weighs the two conflicting considerations or policies which confront the court in this case. The conflicting policies are, on the one hand, "the *protection of the individual* citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government;" and on the other, "the *protection of the public* interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities." (Emphasis added.) Barr v. Matteo, 360 U.S. 564, 565, 79 S.Ct. 1335, 1336, 3 L.Ed.2d 1434 (1959). The Supreme Court cited Bradley v. Fisher, supra, as controlling law, and quoted from an opinion written by the late Judge Learned Hand, as follows:

"'It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most *resolute*, or the *most irresponsible*, in the *unflinching* discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that *is quite another* matter from exposing such as have *been honestly mistaken* to suit by anyone who has *suffered from their errors*. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in *the end better to leave unredressed the wrongs done by dishonest offi-*

cers than to subject those who try to do their duty to the constant dread of retaliation. * * *

"'The decisions have, indeed, always imposed as *a limitation upon the immunity that the official's act must have been within the scope of his powers*; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. *What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him.* * * *' Gregoire v. Biddle, 2 Cir., 177 F.2d 579, 581."

As stated by Judge Hand and quoted as controlling by the Supreme Court, public policy dictates that it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." Barr v. Matteo, supra, l. c. 572, 79 S.Ct. l. c. 1340. This court must now apply the law, as clearly set forth by the United States Supreme Court, to this case.

The court recognizes that there have been situations in the past which have warranted a judge being held civilly liable (see Manning v. Ketcham, 6 Cir., 58 F.2d 948 (1932)). In that case the judge was found to have no authority to act officially over the subject-matter at hand. There was a clear absence of all jurisdiction. That case fits neatly into the test set forth by the Supreme Court back in 1872 (Bradley v. Fisher, supra). The test to be applied is that *if there is a clear absence of all jurisdiction then a judge can be held civilly liable*, otherwise he cannot be held civilly liable.

And so in this action with respect to this motion we must examine the plaintiff's petition *to determine if the plaintiff can prove a set of facts in support of his claim which would entitle him to relief under the test we have just set forth.* Attached to the plaintiff's petition and made a part thereof are four exhibits, *Exhibit A* being a copy of the transcript of the remarks of the defendant Chandler to the grand jury, *Exhibit B* being a copy of an indictment returned by the grand jury on November 10, 1961, in the United States District Court for the Western District of Oklahoma against the plaintiff, *Exhibit C* being a copy of *a brief of the United States Attorney* for the Western District of Oklahoma which was handed to Judge Daugherty of said court, and *Exhibit D* being a copy of an order entered by Judge Daugherty in the criminal case against the plaintiff dismissing the case without prejudice.

We must, therefore, consider not only the petition, but the exhibits attached thereto. A careful examination of the petition *discloses many things alleged which pertain only to maliciousness and ill-will on the part of the defendant toward the plaintiff*, and *are of no consequence* in weighing the petition with respect to the above rule, since *such allegations apply only to Count 2 of the indictment regarding punitive damages. The plaintiff* in arguing the motion to the court stated that *Exhibit A attached to the petition correctly sets forth what occurred before the grand jury on the day preceding the indictment*, and so nothing could be accomplished in this instance to grant to the plaintiff the right to file amended pleadings, since the basis of his complaint is Judge Chandler's remarks to the grand jury on November 9th. As a matter of fact, the plaintiff in his brief filed with the court on November 6, 1963, in support of his motion to remand, set out in some detail an analysis of the allegations of the petition, and following such characterization of the petition, at page 11, had this to say:

"Reduced to even more simple terms, the acts of defendant of

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which plaintiff complains are the defendant's private meetings and conversations with the foreman of the grand jury in order to induce the foreman to initiate an investigation of the plaintiff, and the defendant's invasion of the grand jury room and the accusation of the plaintiff that the defendant there made. These are the acts about which this court must answer this question: Were these acts under the circumstances under which they were done, done in the performance of the defendant's duties as a United States District Judge?"

The position of the plaintiff at the argument on this motion was the same, which was to the effect that *if the defendant's remarks before the grand jury were within the jurisdiction of the defendant as a judge the plaintiff had no cause of action.* To this court this appears to be a proper position, because it was after the defendant's appearance before the grand jury that the plaintiff was indicted, which led to this suit. The other allegations set forth in plaintiff's petition deal with maliciousness and refer to acts which occurred before this time, and following those acts the grand jury had returned a number of indictments but did not return one against the plaintiff.

So, *the real question for the court* is whether or not the plaintiff's petition based upon what occurred before the grand jury on November 9, 1961, which it is admitted by the plaintiff is completely and entirely set out in Exhibit A attached to the petition, was the proper basis for a civil action against the defendant. In other words, was this a judicial act on the part of the defendant or was there a clear absence of all jurisdiction?

[3, 4] The petition discloses that we are dealing with an instance which occurred in a United States district where there is more than one judge; that the defendant, one of those judges, had originally charged this grand jury, had designated the foreman and deputy foreman of the grand jury; and that on the occasion in question went to the grand jury room, constituted it a court room and delivered the remarks here complained of. We must realize that a grand jury has no existence aside from the court which calls it into existence and upon which it is attending. As the Supreme Court said in Brown v. United States, 359 U.S. 41, 49, 79 S.Ct. 539, 546, 3 L.Ed.2d 609, "A grand jury is clothed with great independence in many areas, but it remains an appendage of the court. * * *" While it may be said that the act of Judge Chandler in going to the grand jury room and constituting it a court room was rather unusual, such action on his part was not one lacking in jurisdiction. This was a grand jury of the court. It had been originally charged by him and *he had gone there at the request of the grand jury.* The order filed on September 28, 1962, in the criminal case (Exhibit D attached to and made a part of the petition) sets out the basis for the dismissal of the criminal case without prejudice, and a part of the order reads as follows:

> "However, even though on this occasion the grand jury requested the presence of the chief judge of this court, it is possible that a technical irregularity occurred in the proceeding in that the court as such, mentioning the defendant by name, supplied information in connection with the matter under consideration by the grand jury and regarding which an indictment was returned, and that said indictment should, therefore, be quashed without prejudice."

What occurred may have been sufficient to warrant the quashing of the indictment, but the order clearly only refers to a possible technical irregularity, which is a far cry from absence of jurisdiction. Defendant's conduct with respect to the grand jury was not so clearly without jurisdiction as to meet the test set out by the United States Supreme Court. The defendant's conduct was not clearly without jurisdiction to have an investigation made concerning things which occurred in his court. The de-

fendant's actions set forth in the petition, even if malicious as alleged, and possibly technically irregular, are not grounds for holding the defendant subject to a civil action.

The court for the reasons stated above sustains defendant's motion to dismiss, and the cause is dismissed.

1. Judges ⇐36

Judge is not liable in damages for acts performed in judicial capacity unless there is clear absence of all jurisdiction over subject matter, even though acts are in excess of jurisdiction and done maliciously, corruptly, or arbitrarily.

2. Judges ⇐36

Judicial immunity is a concomitant of the independent judiciary indispensable to well-being of a free people; and it is only in instances in which judge acts or proceeds in clear absence of any color of jurisdiction or proceeds officially in respect to cause or matter over which the court is clearly without any color of jurisdiction that he may be subjected to personal liability as a trespasser for damages arising out of his unauthorized act.

3. Federal Civil Procedure ⇐1835

Generally, in considering motion to dismiss for failure of complaint to state cause of action, all facts well pleaded are admitted.

4. Judges ⇐36

Federal district judge, in whose court grand jury had convened, was not acting clearly in absence of any jurisdiction so as to remove judicial immunity from liability, when he appeared in grand jury room, which he then designated a court room, and furnished information concerning claim plaintiff had asserted in proceeding before judge. 18 U.S.C.A. § 152.

5. Grand Jury ⇐33

Federal judge in whose court grand jury convened had power and jurisdiction not only to call attention to what he thought was violation of law, but also to direct that available evidence be presented to grand jury.

6. Judges ⇐36

Allegation that judge's acts were part of conspiracy would not be sufficient to state claim upon which relief could be granted if claim were otherwise barred by doctrine of judicial immunity.

7. Federal Civil Procedure ⇐1838

Plaintiff, whose complaint had been dismissed on ground of defendant's judi-

W. H. Pat O'BRYAN, Appellant,
v.
Stephen S. CHANDLER, Appellee.
No. 7907.

United States Court of Appeals
Tenth Circuit.
Nov. 30, 1965.

Action against federal district judge for damages for malicious prosecution, libel and slander. The case was removed from state court. The United States District Court for the Western District of Oklahoma, Roy W. Harper, J., 249 F. Supp. 51, dismissed the complaint, and plaintiff appealed. The Court of Appeals, Pickett, Circuit Judge, held that judge, in whose court grand jury had convened, was not acting clearly in absence of any jurisdiction so as to remove judicial immunity from liability, when he appeared in grand jury room, which he then designated a court room, and furnished information concerning claim plaintiff had asserted in proceeding before judge.

Affirmed.

cial immunity, was not entitled to amend, although there had been no responsive pleadings, to allege same acts and that they were part of conspiracy. Fed.Rules Civ.Proc. rule 15(a), 28 U.S.C.A.

Reagan M. Martin, Dallas, Tex., for appellant.

Granville Tomerlin, Oklahoma City, Okl., for appellee.

John W. Douglas, Asst. Atty. Gen., Morton Hollander and David L. Rose, Attys., Dept. of Justice, Washington, D. C., for United States as amicus curiae.

Roy C. Lytle and William D. Curlee, Oklahoma City, Okl., for Oklahoma Bar Association as amicus curiae.

Before PICKETT, LEWIS, BREITENSTEIN, HILL and SETH, Circuit Judges.

PICKETT, Circuit Judge.

W. H. Pat O'Bryan, an Oklahoma attorney and Certified Public Accountant, instituted this action against Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, to recover damages, actual and punitive, for alleged malicious prosecution, libel and slander,[1] arising out of certain activities of Judge Chandler before a grand jury, which resulted in a criminal indictment against O'Bryan. This is an appeal from an order dismissing the complaint on the grounds that the alleged misconduct of Judge Chandler was not clearly in the absence of his jurisdiction as a Judge, and that he therefore was judicially immune from civil liability.

[1, 2] It is settled doctrine that a Judge is not liable in damages for acts performed in a judicial capacity unless there is a "clear absence of all jurisdiction" over the subject matter. This is true, even though the Judge's acts are in excess of his jurisdiction and done maliciously, corruptly, or arbitrarily. Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646. This court, in Ryan v. Scoggin, 10 Cir., 245 F.2d 54, 58, announced the rules in these words:

> "It is a principle of universal acceptation in its relation to judges at all levels that a judge is not liable in damages resulting from an order entered or a judgment rendered in an action or proceeding over which the court has jurisdiction of the subject matter and of the parties, even though such order or judgment is in excess of the vested jurisdiction, or is otherwise erroneous and is set aside or reversed on appeal or other review. That deep-seated fundamental rule of ancient origin and frequent repetition rests upon considerations of public policy that such immunity is a concomitant of an independent judiciary which is indispensable to the well-being of a free people. * * * (Citing cases). It is only in instances in which a judge acts or proceeds in the clear absence of any color of jurisdiction or proceeds officially in respect to a cause or matter over which the court is clearly without any color of jurisdiction that he may be subjected to personal liability as a trespasser for damages arising out of his unauthorized act. * * *"

See, also, Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434; Gregoire v. Biddle, 2 Cir., 177 F.2d 579, cert. denied 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363; Brictson v. Woodrough, 8 Cir., 164 F.2d 107,[2] cert. denied 334 U.S. 849, 68 S.Ct. 1500, 92 L.Ed. 1772.

[3] It is, of course, the general rule that in considering a motion to dismiss for failure of the complaint to state a

1. The action was brought in the District Court of Oklahoma City, Oklahoma, and timely removed to the United States District Court for the Western District of Oklahoma upon petition of Judge Chandler, under the provisions of 28 U.S.C. § 1442.

2. The Brictson case was heard in the 8th circuit before a panel of judges from the 10th circuit sitting by assignment.

cause of action, that all facts well pleaded are admitted. Ryan v. Scoggin, supra. The material allegations of the complaint, and exhibits attached thereto, show that O'Bryan had filed a claim for more than one million dollars in a bankruptcy proceeding known as the "Selected Investments case",[3] then pending in Judge Chandler's court. At a hearing in the bankruptcy proceedings, O'Bryan first supported the claim with oral testimony; he later produced a letter contract in support of his claim. The court found the claim to be fraudulent, disallowed it, and required O'Bryan to return $5,000 to the Trustee in Bankruptcy. O'Bryan was thereupon disbarred from the practice of law in the United States District Court for the Western District of Oklahoma. The Judge was convinced that the letter contract had been fabricated, that the claim was fraudulent, and that O'Bryan had committed perjury in his attempt to sustain it.

On November 7, 1961 a grand jury was convened in the Western District of Oklahoma where it was qualified by Judge Chandler and given the usual general instructions as to its duties.

It is alleged that when the grand jury had completed consideration of the cases to be presented by the United States District Attorney, Judge Chandler, after having consulted privately with the foreman of the grand jury concerning the O'Bryan matter, appeared personally in the grand jury room at the request of the foreman. Judge Chandler first announced that the room was "a United States Court Room now instead of a Grand Jury Room, to keep you all from having to come upstairs." He advised the grand jury that he was there at the request of the foreman to explain the original instructions and to answer questions submitted by members of the grand jury, and he said that when he left "you can reform as to the Grand Jury." Thereupon the grand jury foreman requested that the Judge furnish certain information which he had concerning O'Bryan's transactions in the Selected Investments Corporation matter. The O'Bryan claim was then explained in detail, including the reasons for its disallowance. The Judge explained that he was not suggesting that any indictment be returned, but that it was his duty to direct the attention of the grand jury to possible violations of criminal laws for investigation. The original instructions were reiterated, and the United States Attorney advised the grand jury that his office stood ready to produce any information that it desired. Thereafter a 2-count indictment was returned charging O'Bryan with making a false claim in a bankruptcy proceeding and with concealing assets from a trustee in bankruptcy, in violation of 18 U.S.C. § 152. On September 28, 1962, Judge Fred Daugherty of the United States District Court for the Western District of Oklahoma, dismissed the indictment without prejudice, upon the ground that Judge Chandler's activities in the presentation to the grand jury of the O'Bryan matter was a "technical irregularity" which invalidated the indictment.

[4, 5] We cannot agree with O'Bryan's contentions that Judge Chandler's conduct was clearly in absence of any jurisdiction and that his acts were those of a private individual. While it appears that the Judge's method of suggesting that the grand jury investigate the O'Bryan matter may have been unusual, irregular, or even erroneous, there nevertheless was no clear absence of jurisdiction. The grand jury was regularly convened in the United States District Court for the Western District of Oklahoma, of which Judge Chandler was the Chief Judge. Acting in that capacity, he had

3. Matters involving the Selected Investments Corporation bankruptcy proceedings have been before this court in a number of cases. Carey v. Selected Investments Corp., 10 Cir., 319 F.2d 578; Burns v. United States, 10 Cir., 286 F. 2d 152; Workman v. Harrison, Trustee, 10 Cir., 282 F.2d 693; Selected Investments Corp. v. Duncan, 10 Cir., 260 F.2d 918, cert. denied 359 U.S. 914, 79 S.Ct. 584, 3 L.Ed.2d 576.

qualified the grand jury, designated its foreman and deputy foreman, and submitted to it the usual instructions. It was an appendage to the court over which he presided. Brown v. United States, 359 U.S. 41, 79 S.Ct. 539, 3 L.Ed.2d 609, rehearing denied 359 U.S. 976, 79 S.Ct. 873, 3 L.Ed.2d 843. The O'Bryan claim had been heard by Judge Chandler in a proceeding pending in his court; that he strongly suspected irregularity in the filing of that claim is understandable. The propriety of his expressions of opinion as to O'Bryan's guilt is questionable; still, the Judge had the power and jurisdiction not only to call attention to what he thought was a violation of the law, but also to direct that available evidence be presented to the grand jury. Arbor v. Blue, 10 Cir., 45 F.2d 746.

After entry of the judgment dismissing the complaint, O'Bryan sought leave to file an amended complaint. The court refused to permit the pleading to be filed. It is contended here that no responsive pleading had been filed, and that Rule 15(a) F.R.Civ.P. authorized the filing as a matter of right.[4] While there are decisions to the contrary,[5] this court has held that the right to amend without leave of the court ends "with the entry of a judgment dismissing the action" and the filing of amended pleadings thereafter is addressed to the sound discretion of the court. Feddersen Motors v. Ward, 10 Cir., 180 F.2d 519. Accord: Swan v. Board of Higher Education of the City of New York, 2 Cir., 319 F.2d 56.

[6, 7] The prolix document submitted by O'Bryan as an amended complaint covers twenty pages of the printed record, much of which is completely extraneous matter interposed with scandalous and scurrilous statements. It is an attempt to state a cause of action based upon an alleged conspiracy entered into between Judge Chandler and ten other persons. These ten additional individuals are named as defendants without an order of the court. It appears from the amended complaint that the purpose of the so-called "conspiracy" was to effect a disallowance by Judge Chandler of O'Bryan's claim in the bankruptcy proceeding herein mentioned, and to cause a criminal indictment to be returned against him. The only substantive difference between the allegations in the original complaint and those in the proposed amended complaint is that those same acts complained of in the original complaint are now alleged to be the product of the conspiracy. The proposed amended complaint states that the acts of Judge Chandler were "wrongfully, willfully, knowingly, purposely designedly, fraudulently, maliciously, oppressively and corruptly" performed. These are the same acts for which we have heretofore said Judge Chandler could not be held liable in damages. As the trial Judge states, "* * * the acts of defendant [Chandler] of which plaintiff complains are the defendant's private meetings and conversations with the foreman of the grand jury in order to induce the foreman to initiate an investigation of the plaintiff, and the defendant's invasion of the grand jury room and the accusation of the plaintiff that the defendant there made." This is the gravamen of the original complaint as well as the tendered amended complaint. Allegations that the acts of Judge Chandler were part of a conspiracy would not be sufficient to state a claim upon which relief could be granted if the claim is otherwise barred by the

4. Rule 15(a), F.R.Civ.P. provides:
"(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. * * *"

5. Breier v. Northern Calif. Bowling Proprietors' Ass'n, 9 Cir., 316 F.2d 787; Fuhrer v. Fuhrer, 7 Cir., 292 F.2d 140; Peterson Steels v. Seidmon, 7 Cir., 188 F.2d 193;. Kelly v. Delaware River Joint Comm'n, 3 Cir., 187 F.2d 93, cert. denied 342 U.S. 812, 72 S.Ct. 25, 96 L.Ed. 614.

doctrine of judicial immunity. Agnew v. Moody, 9 Cir., 330 F.2d 868, cert. denied 379 U.S. 867, 85 S.Ct. 137, 13 L.Ed. 2d 70; Brictson v. Woodrough, supra. We find no abuse of discretion of the trial Judge in refusing to permit the filing of the amended complaint.

Affirmed.

APPENDIX P

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

In the Matter Pertaining to W. H. Pat O'Bryan) Miscellaneous No. 7

[Filed Mar. 29, 1967]

ORDER

Now on this 28 day of March, 1967, there comes on for further consideration the motion of W. H. Pat O'Bryan to vacate and expunge from the record an order striking his name from the roll of attorneys authorized to practice law in this court. After considering the further statement of the movant filed pursuant to the order of this court entered on January 26, 1967, and after examining the pertinent records in the office of the clerk of this court, the court is of the opinion, and so finds, that the motion should be denied without a hearing.

From an examination of a transcript of the proceedings on November 3, 1958, in Bankruptcy Case No. 10680, In the Matter of Selected Investments Corp., et al., it appears that evidence was offered by the trustee for the corporation tending to show that the movant herein, W. H. Pat O'Bryan, had undertaken to support a claim against the trustee by a false and fraudulent instrument, a letter; that when such evidence was offered the court at the request of W.H. Pat O'Bryan and his attorney continued the case for further hearing until November 10, 1958; and that at the hearing on November 3, 1958, the court clearly indicated to the movant and his counsel the seriousness with which he viewed the evidence and cautioned the movant of the need to be prepared to offer evidence at the subsequent hearing to disprove the apparent misconduct.

From a statement by the judge handling the matter, Stephen S. Chandler, referred to in the previous order of this court, it appears that the movant's attorney was clearly

advised on November 7, 1958, that unless evidence was offered at the hearing set for November 10, 1958, to disprove the fabrication the movant would be disbarred from practice in this court. Although afforded an opportunity to deny this statement, the movant has failed to do so and the statement will therefore be taken as establishing as a fact that prior to the hearing on November 10, 1958, the movant had been fully advised as to the purpose of the hearing and of the possible consequences to him.

From an examination of a transcript of the proceedings on November 10, 1958, it appears that the movant was present and represented by counsel, that he was fully advised again of the consequences if he should fail to offer testimony to disprove the evidence introduced at the hearing on November 3, 1958, respecting the filing of a false and fabricated document, and that no such evidence was offered at the hearing by the movant.

It further appears from an examination of the record of the proceedings on November 10, 1958, an examination of the docket entries for that date, the daily blotter of the court clerk, the special docket for attorneys' admissions and grievances, disbarments, etc., and an examination of the files in the office of the clerk of this court, that on November 10, 1958, an order was entered, signed by all of the judges of this court at the time, striking the name of the movant from the roll of attorneys of this court, and that appropriate entries were made on the various pertinent dockets. And it further appears that no appeal was taken by the movant from this order.

From a further examination of the records of the clerk of this court it appears that on September 2, 1959, an application was filed by the movant for permission to file a motion for reconsideration of his claim against the trustee for Selected Investments and to vacate the order entered November 10, 1958, and restore the movant's name to the list of attorneys entitled to practice before this court; that a hearing on the application was held on September 25,

1959; at which time the application was denied; and that an appeal from this order was denied on December 2, 1959, as not timely filed.

The court finds, therefore, that the order of November 10, 1958, striking the movant's name from the list of attorneys authorized to practice before this court was entered after the movant had been given notice of the charge against him and had been afforded an opportunity to prepare and present a defense; that on September 25, 1959, the court denied an application of the movant to vacate the order and restore his name to the roll of attorneys; that no timely appeal was taken from either order; and that the movant is not entitled to a reconsideration of said orders in this proceedings. The court further finds that since said orders have become final and may not be set aside, no useful purpose could be served in setting this matter for hearing.

IT IS THEREFORE BY THE COURT ORDERED that the motion or application of W.H. Pat O'Bryan to vacate the order of this court entered November 10, 1958, and restore his name to the list of attorneys authorized to practice before this court be and the same hereby is overruled and denied, and this action is dismissed.

Edwin Langley
District Judge

APPENDIX Q

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November, 1967, Term

W. H. PAT O'BRYAN,
Appellant,
v.
STEPHEN S. CHANDLER,
Appellee.

[Misc. No. 7]
No. 9563

[Filed Dec. 29, 1967]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Reagan M. Martin (Harvey L. Davis on the brief), Dallas, Texas, for Appellant;

No appearance for Appellee.

Before PICKETT, HILL and SETH, United States Circuit Judges.

PER CURIAM.

A brief recitation of the history of this controversy is essential to our disposition of the appeal.

The records in the office of the Clerk of the United States District Court for the Western District of Oklahoma show that in November, 1958, an order, signed by all of the active judges of that court, was entered barring appellant from practicing law in that court. In 1963, appellant came directly to this court asking for a writ of mandamus declaring the disbarment order void and compelling the striking of it from

the records. The writ was denied because we thought petitioner had full relief available to him in the court where the order had been entered. O'Bryan thereafter attempted to pursue his remedy in that court but was confronted by delays of more than two years and then had not been afforded a hearing. In 1966, he again asked this court for mandamus relief in the matter of his disbarment. Pursuant to that request, this court, on October 11, 1966, by an order, denied any affirmative relief but disqualified respondent in the matter and assigned all pending motions and other matters to the judge of the district next senior to the chief judge. Such next senior judge thereafter disqualified himself and the pending matters were taken over by a judge from another district.

No hearing was thereafter granted appellant but he was required to file what the court called a "Further Statement" and on the basis of this document and the files and records in the court pertaining to the pending matters the court entered an order stating, in part, "No useful purpose could be served in setting this matter for hearing" and dismissing appellant's application.

O'Bryan attacks the disbarment order on several grounds and in substance contends that he was denied the basic and minimal rights of an accused attorney under the circumstances reflected here, as such rights were enunciated in Theard v. United States, 354 U.S. 278. He also places reliance upon an alleged violation of the local court Rule 4(d) requiring that grievances against members of the bar of the court to be first submitted to a committee of the bar for investigation and recommendation. The very nature of appellant's contentions clearly shows he is entitled to a hearing. This, we thought, was inherent in our order of October 11, 1966, but it was not so interpreted.

The order appealed from is set aside and the matter is remanded with directions to afford appellant an evidentiary hearing on the merits of the controversy and thereafter for the court to make appropriate findings of fact and conclu-

sions of law. We should expressly state that this order does not supersede this court's order of October 11, 1966, but is a supplement thereto.

Explanatory Note by Petitioner:

[This untimely appeal from Judge Langley's judgment (Appendix P) was improperly entitled O'Bryan v. Chandler by counsel for O'Bryan and this reversal of Judge Langley's judgment was obtained at an *ex parte* hearing. On rehearing this Opinion was later withdrawn and under the proper title the appeal from Judge Langley's judgment was dismissed. See Appendix Q-4, pp. 917, 918.]

Appeal dismissed for lack of jurisdiction.

1. Courts ⇐485(14.15)

Court of Appeals normally acquires jurisdiction of case appealed from district court judgment only upon filing of timely notice of appeal. Fed.Rules Civ. Proc. rule 73(a), 28 U.S.C.A.; Fed. Rules App.Proc. rule 4, 28 U.S.C.A.

2. Courts ⇐485(14.1)

Test of application of 60-day period for taking an appeal from district court judgment is not whether the United States might be concerned or interested in the final judgment, but whether it is a party to the action in which the judgment is entered. Fed.Rules Civ. Proc. rule 73(a), 28 U.S.C.A.; Fed. Rules App.Proc. rule 4, 28 U.S.C.A.

3. Courts ⇐485(14.1)

Signing of final order by federal judge overruling motion to vacate order of disbarment did not constitute that judge a party to the action within meaning of rule providing that appeal may be taken within 30 days after entry of judgment "except that in any action in which the United States or any officer or agent thereof is a party" the time shall be 60 days from such entry, and accordingly, appeal from order in question was untimely because not taken within 30 days from entry thereof. Fed.Rules Civ.Proc. rule 73(a), 28 U.S.C.A.; Fed.Rules App. Proc. rule 4, 28 U.S.C.A.

APPENDIX Q-4

In the Matter Pertaining to W. H. "Pat" O'BRYAN.

No. 8563.

United States Court of Appeals Tenth Circuit.

Sept. 18, 1968.

The United States District Court for the Western District of Oklahoma, Edwin Langley, J., overruled motion to vacate disbarment order, and an appeal was taken. The Court of Appeals, on a petition for rehearing after it had vacated the District Court's order, held that signing of final order by federal judge overruling motion to vacate order of disbarment did not constitute that judge a party to the action within meaning of rule providing that appeal may be taken within 30 days after entry of judgment "except that in any action in which the United States or any officer or agent thereof is a party" the time shall be 60 days from such entry, and accordingly, appeal from order in question was untimely because not taken within 30 days from entry thereof.

Reagan M. Martin, Dallas, Tex. (Harvey L. Davis, Dallas, Tex., on the brief), for appellant.

Jeff R. Laird, General Counsel, Oklahoma Bar Ass'n, Oklahoma City, Okl., amicus curiae.

Before PICKETT, HILL and SETH, Circuit Judges.

PER CURIAM.

This matter arose out of a November 19, 1958 order of the Honorable Stephen

1. See Bereslawsky v. Esso Standard Oil Co., 175 F.2d 148 (4th Cir. 1949).

S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, striking the name of W. H. "Pat" O'Bryan from the roster of attorneys authorized to practice before that court. The order followed a hearing on O'Bryan's claim for attorney fees filed in a bankruptcy proceeding, which O'Bryan supported with a letter-contract purportedly signed by the bankrupt and found by the court to be false and fraudulent. Thereafter, upon the same charge, the Supreme Court of Oklahoma disbarred O'Bryan from the practice of law in Oklahoma courts. State ex rel. Oklahoma Bar Ass'n v. O'Bryan, 385 P.2d 876, cert. denied 376 U.S. 649, 84 S.Ct. 983, 11 L.Ed.2d 980. The facts are fully set forth in the opinion of the Oklahoma court.

On September 2, 1963, following denial by this court of relief in a mandamus action, O'Bryan filed a motion to vacate the disbarment order and expunge it from the court records. No action was taken on the motion for more than two years, whereupon O'Bryan again sought mandamus relief in this court. Affirmative relief was denied, but Judge Chandler was disqualified from acting further in the matter, and all pending proceedings and other actions arising thereafter were directed to be assigned to another Judge. It fell to the lot of Judge Edwin Langley, Chief Judge of the Eastern District Court of Oklahoma, to put an end to the long drawn-out proceedings. The Judge made a careful study of the court records of all the cases involved in the disbarment matter and directed O'Bryan to file a statement in response to certain factual matters disclosed in the records of the various cases, all of which were fully set forth in the order. O'Bryan filed a response and thereafter, without further hearing, Judge Langley entered a final order overruling the motion to vacate the disbarment order. A motion to set aside this order and grant a formal hearing was overruled by order of April 12, 1967. A notice of appeal was not filed until June 8, 1967, the 57th day after the entry of the final order.

The record on appeal came to this court, and the only appearance was by O'Bryan. On December 29, 1967 we vacated Judge Langley's order because we thought it was inherent in our order of October 11, 1966 that O'Bryan was entitled to a formal hearing under the rule of Theard v. United States, 354 U.S. 278, 77 S.Ct. 1274, 1 L.Ed.2d 1342. Thereafter Judge Chandler filed a document designated "Motion to Clarify." This motion was treated as a petition for rehearing and was set for oral argument. We granted the Oklahoma State Bar Association permission to appear amicus curiae for the purpose of filing a brief and presenting oral argument.

[1] At the outset we are confronted with a jurisdictional question because the notice of appeal was not filed within 30 days after the entry of the order from which appeal was taken. It is the general rule, including that of this circuit, that a court of appeals acquires jurisdiction of a case appealed from a district court decision only upon the filing of a timely notice of appeal. Barron & Holtzoff, Ruled Ed. § 1553; Cohen v. Plateau Natural Gas Co., 10 Cir., 303 F.2d 273, cert. denied 371 U.S. 825, 83 S.Ct. 45, 9 L.Ed.2d 64; Wagoner v. Fairview Consolidated School Dist. No. 5, 10 Cir., 289 F.2d 480, cert. denied 368 U.S. 921, 82 S.Ct. 241, 7 L.Ed.2d 135; Martin v. United States, 10 Cir., 263 F.2d 516, cert. denied 365 U.S. 853, 81 S.Ct. 818, 5 L.Ed.2d 816; Stone v. Wyoming Supreme Court, 10 Cir., 236 F.2d 275.

Rule 73(a), F.R.Civ.P., now Rule 4, F.R.Appellate P., provides that an appeal may be taken within 30 days after the entry of the judgment appealed from "except that in any action in which the United States or any officer or agent thereof is a party" the time shall be 60 days from such entry. It is urged that the United States is actually a party to these proceedings because they arose out of the action of a United States District Judge—but we think not. The signing of the order by Judge Langley overruling O'Bryan's motion to vacate was no different than the signing of a similar

order in any other civil proceeding. It is true that Judge Chandler was a respondent in various mandamus actions, but these were actions independent of the disbarment proceeding and for the purpose of requiring the District Judge to act on a pending matter.

[2, 3] The exception to the basic 30-day limit for taking an appeal is clear and explicit. It applies only to those cases in which the United States or an officer or agent thereof is a party. The United States is allowed additional time to appeal because, in many instances, of the necessary delay by various governmental departments to determine whether an appeal should be taken.[1] The test as to the application of the 60 day period is not whether the United States might be concerned or interested in the final judgment, but whether it is a party to the action in which the judgment is entered. United States v. American Soc. of Composers, Authors and Publishers, 2 Cir., 331 F.2d 117, cert. denied 377 U.S. 997, 84 S.Ct. 1917, 12 L.Ed.2d 1048. Cf. Michaels v. Chappell, 9 Cir., 279 F.2d 600, cert. denied 366 U.S. 940, 81 S.Ct. 1663, 6 L.Ed.2d 851; Hare v. Hurwitz, 2 Cir., 248 F.2d 458. The United States or any of its officers or agents did not appear in the disbarment proceedings, and so far as the record shows it had no right of appeal from the final decision. We are of the opinion that the signing of a final order by a Federal Judge overruling a motion to vacate an existing order of disbarment does not constitute that Judge a party to the action within the meaning of Rule 73(a), and an appeal from such order must be taken within 30 days from the entry thereof.

The December 29, 1967 per curiam order of this court is withdrawn and the appeal is dismissed for lack of jurisdiction.

Explanatory Note by Petitioner:

[Counsel for O'Bryan petitioned the Supreme Court for Certiorari in this case again under the incorrect title of O'Bryan v. Chandler, Chief Judge, etc., No. 1011, October Term 1968, cert. denied 394 U.S. 906, 22 L.Ed.2d 217, 89 S. Ct. 1014; Petition for Rehearing denied, 394 U.S. 994, 22 L.Ed.2d 772, 89 S. Ct. 1456.]

1. The notes of the Advisory Committee on Criminal Rules referring to the 60 day provision of Rule 73(a) state:

"In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example, in a tax case the Bureau of Internal Revenue must first consider and decide whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation. The file then goes to the

APPENDIX S

O'BRYAN v. STATE ex rel, Oklahoma Bar Association.

No. SCBD 1791. Jan. 12, 1971.

ORDER

It is ordered that the Rehearing in the above styled cause is denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 12th day of January, 1971.

WM. A. BERRY
Chief Justice

O'BRYAN v. STATE ex rel, Oklahoma Bar Association.

No. SCBD 1792. Jan. 12, 1971.

ORDER

The application of William Howard Patrick O'Bryan to be reinstated to the practice of law within this state with a

record of the proceedings conducted in various hearings before the General Counsel of the Bar Association and a recommendation of the Board of Governors of the Bar that the application be denied have been filed in this Court. There have also been filed various letters, affidavits, and other written instruments signed by various persons urging the reinstatement of applicant.

We have examined all of such matters and in addition have considered the argument and the authorities relied upon by applicant in his brief. Even considering the evidence in the light most favorable to applicant, we conclude that his application should be denied.

In arriving at the above conclusion we have considered applicant's argument that (during the period of his suspension) he did not engage in the practice of law but in the practice of his profession as a certified public accountant when he signed his name as "attorney for" certain persons on instruments which were then filed in proceedings pending before the Oklahoma Tax Commission. There was not, however, a satisfactory explanation given as to why applicant referred to himself in a sworn affidavit filed in one of those cases as follows:

> "I am a lawyer and certified public accountant; I have carried on a public practice in my respective professions for a period of more than 30 years."

We notice also the testimony of a Mr. R., which was not disputed by applicant, that the latter, since his disbarment, represented a certain individual in a matter in federal court. The applicant testified in the record before us that he had not practiced law in any jurisdiction nor had he ever held himself out to anyone as being a practicing attorney.

We are unable to reconcile this testimony with the contrary evidence in this record.

There was considerable character type evidence adduced on applicant's behalf. This evidence while impressive is not controlling. We have no way of knowing the extent or the means of observing applicant available to these witnesses especially with regard to the primary point, which is whether applicant has been engaged in the practice of law since his disbarment by this Court.

We have examined the factual basis for this Court's holdings in the cases urged by applicants as persuasive here. The cases are distinguishable and inapplicable. Cases of this kind are usually decided upon the peculiar circumstances of the case and do not lend themselves to solution by reference to concrete principle of law.

We adopt as the findings and the order of this Court the following quoted portions of the report and recommendation of the Board of Governors of the Oklahoma Bar Association and based thereon deny the application of Mr. O'Bryan to be reinstated to the practice of law in this state:

"THEREFORE, the Board of Governors of the Oklahoma Bar Association finds that the applicant, William Howard Patrick O'Bryan, (a) has engaged in the unauthorized practice of law during the period of his suspension and that he (b) does not possess the moral qualifications required for admission to practice law in the State of Oklahoma, and (c) that he does possess the competency and learning in the law required for admission to practice law in the State of Oklahoma, and (d) that his resumption of the practice of law in Oklahoma would be detrimental to the integrity and standing of the bar, the administration of justice and the public interest.

Wherefore, the Board respectfully recommends that the court order enter its order denying the application of William Howard Patrick O'Bryan for reinstatement to the practice of law in Oklahoma."

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 21st day of December, 1970.

PAT IRWIN
Chief Justice

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APPENDIX T

CONSTITUTION

ARTICLE III.—THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

§ 132. Creation and composition of district courts

(a) There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district.

§ 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

CHAPTER 151—DECLARATORY JUDGMENTS

Sec.
2201. Creation of remedy.
2202. Further relief.

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, § 12(p), 72 Stat. 349.

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Rule 57.

DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

As amended Dec. 29, 1948, eff. Oct. 20, 1949.

Rule 56.

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

APPENDIX U

CHART OF O'BRYAN LITIGATION

This chart was prepared to provide a more graphic synoptic view of the multiple ramifications of the O'Bryan litigation through the state and federal courts over a period of thirteen years. It gives a semblance of order and reality to the entire tangled mass of court proceedings.

The resulting picture makes it seem almost incredible that the appellate courts have so long permitted, and continue to permit, O'Bryan and his counsel to so abuse the processes of the courts to harass and defame a Federal Judge in retribution for his official acts.

LARGE BLACK TYPE interspersed according to date shows all items on Chart used by O'Bryan's counsel in Court of Appeals Oral Argument.

Selected Investments Corporation Reorganization Proceedings under Chapter X, Bankruptcy Act, No. 10680-BK., USDC, WD, Oklahoma, adjudicated and Trustee appointed March 3, 1958.

O'Bryan v. Selected Investments Corporation.

March 24, 1958 - O'Bryan filed a verified claim against estate for $1,200,000 attorneys fees based upon oral contract.

April 21, 1958 - O'Bryan filed a verified Amendment to his claim for attorneys fees attaching a purported written contract with the bankrupt corporation signed by its president, which he stated that he had just "found".

November 3, 1958 and November 10, 1958 - O'Bryan's claim, as amended, which was contested by the Trustee, heard by Judge Chandler at fully noticed hearings. Judge Chandler found that the claim for attorneys fees had already been paid and that the written contract prepared and signed by O'Bryan and the president of the bankrupt corporation was wholly fabricated. He entered judgment denying the claim, ordering O'Bryan to refund to the Trustee $5,000 overpayment and disbarred him for his illegal and fraudulent conduct.

November 10, 1958 - The disbarment Order designated by the court clerk as Misc. 7 was signed by Judge Chandler, joined by the other members of the Court.

December 23, 1958 - No appeal taken from disallowance of claim or Order of disbarment. Affirmative $5,000 judgment paid by O'Bryan. Judgment denying claim and disbarment Order both became final.

September 2, 1959 - O'Bryan obtained different counsel, filed Motion to Reconsider denial of his claim and the disbarment Order.

September 25, 1959 - Motion to Reconsider heard by Judge Chandler at fully noticed hearing and overruled. At this hearing Judge Chandler made the specific finding that the records of the corporation showed that O'Bryan had been paid in full in 1957 for the services for which the claim was filed, that the claim was fraudulent and that the written contract which O'Bryan had "found" was fabricated.

O'Bryan, O'Bryan & O'Bryan v. Harrison, Trustee, CA No. 6262.

O'Bryan appealed from the Order denying his Motion for Reconsideration of the claim and the refusal to set aside the Order of disbarment.

O'Bryan, O'Bryan & O'Bryan v. Harrison, Trustee.

December 2, 1959 - Appeal dismissed as untimely-second final adjudication of judgment and Order of disbarment. 274 F.2d 831.

Oklahoma Bar Association, Complainant vs. William Howard (Pat) O'Bryan, Respondent.

March 2 and 3, 1959 - The Oklahoma Bar Association initiated disbarment proceedings and held a public trial at the Oklahoma County Courthouse in which Judge Chandler took no part and upon entirely different evidence recommended O'Bryan's disbarment to the Oklahoma Supreme Court.

State of Oklahoma ex rel Oklahoma Bar Association vs. William Howard (Pat) O'Bryan.

June 18, 1963 - Oklahoma Supreme Court disbarred O'Bryan. 385 P.2d 876; reh. den. September 10, 1963; Application for Leave to File Second Petition for reh. den. October 29, 1963; cert. den. 376 U.S. 649, 11 L.Ed.2d 980, 84 S.Ct. 983, March 30, 1964. In the Opinion the Supreme Court of Oklahoma stated on page 890 of the Opinion:

"We conclude that the evidence in this case is sufficient to overcome the presumption that Respondent is innocent and to establish with reasonable certainty that the charge against him is true."

O'Bryan v. Chandler, No. 148355, District Court of Oklahoma County.

October 30, 1959 - First libel action - O'Bryan sued Judge Chandler in State Court for $1,500,000 for libel, based on fabricated letter. R. Vol. II, Item No. 3.

December 1, 1959 - Dismissal signed and filed by O'Bryan confessing letter quoted in his Petition alleged to be libelous had not been written by Judge Chandler. App. K.

NOV. 19, 61 [November 9, 1961]

CHANDLER APPEARED BEFORE GRAND JURY. O'BRYAN INDICTED

November 10, 1961 - O'Bryan indicted for filing the false and fabricated claim and concealing $20,200 of bankrupt's funds in his personal account in Mercantile National Bank in Dallas, Texas which Judge Chandler ordered him to repay and which he had paid to the Trustee in December 1959.

September 28, 1962 - Judge Daugherty dismissed indictment against O'Bryan on technical grounds and found statements vilifying Judge Chandler made by O'Bryan's then counsel, a lawyer since disbarred by the Oklahoma Supreme Court, were shown by the transcript of the Grand Jury proceedings to be false and expunged them from the records. App. V.

O'Bryan v. Chandler, CA #7400.

July 19, 1963 - O'Bryan filed an original action against Judge Chandler in the Court of Appeals to Mandamus him to set aside the Order of disbarment alleging it to be void because he had no opportunity to defend.

September 13, 1963 - Court of Appeals denied Application for Writ of Mandamus in foregoing case. CA 7400, not reported. App. E. Third final adjudication of disbarment Order.

SEPT. 25, 63 O'BRYAN FILED MALICIOUS PROSECUTION ACTION

O'Bryan v. Chandler, No. 161533, District Court of Oklahoma County.

September 25, 1963 - After Statute of Limitations ran on the crimes and O'Bryan had not been reindicted, he sued Judge Chandler for $10,000,000 for malicious prosecution, libel and slander. (Second damage suit for libel and slander.)

Removed to Federal Court by Judge Chandler where it was designated O'Bryan v. Chandler, No. 63-339.

1964-5 DISTRICT COURT HELD MALICIOUS PROSECUTION ACTS JUDICIALY IMMUNE O'BRYAN APPEALED. BRIEFS FOR CHANDLER FILED BY DEPT. OF JUSTICE & OKLAHOMA STATE BAR.

O'Bryan v. Chandler, No. 63-339, USDC, WD, Oklahoma

July 1, 1964 - Libel action dismissed by Judge Harper, Assigned, on ground of judicial immunity. 249 F. Supp. 51.

July 1, 1964 - O'Bryan attempted to file scurrilous Motion to Reconsider and Affidavit and tendered scurrilous Amended Petition for filing defaming Judge Chandler and others. Judge Harper sealed scurrilous matter attached to Motion and refused permission to file Amended Petition. CA Transcript of Record, pp. 48 and 55-74.

May 28, 1965 - O'Bryan filed record and brief in Court of Appeals defaming Judge Chandler. Reagan Martin, O'Bryan pro se and Harlan Grimes, another disbarred Oklahoma lawyer, in the Briefs in Court of Appeals charged Judge Chandler with violation of specific United States felony statutes and charged dishonor, personal interest and criminal acts to the writer of an Amicus Curiae Brief for the Oklahoma Bar Association and attorneys for the Trustee in the Selected bankruptcy proceedings, stating - "The Canons of Ethics do not call upon the Bar to defend this corrupt Judge * * * who is guilty of violation of Federal Criminal Laws." CA #7907. R. Vol. II, Items 7 & 8.

AUG. 15, 65
TAN PRINTED VERSION #1 OF OFFICIAL STATEMENT
DELIVERED TO OKLAHOMA JOURNAL EDITOR

August 18, 1965 - Court of Appeals granted Judge Chandler leave to file brief entitled "Official Statement" in answer to O'Bryan's scurrilous, defamatory brief. Oklahoma City Times carries news item that Judge Chandler stated O'Bryan was accomplice in Supreme Court bribery. R. Vol. V, Item 3.

AUG. 18, 65
BLUE PRINTED VERSION #2 OF OFFICIAL STATEMENT
FILED IN TENTH CIRCUIT.

AUG. 18, 65
ORAL ARGUMENT OF MALICIOUS
PROSECUTION APPEAL TO TENTH CIRCUIT.

AUG. 19, 65
ONLY
OKLAHOMA JOURNAL HEADLINE
"O'BRYAN CALLED BRIBE MASTER MIND"

SEPT. 1, 65 MOTION TO STRIKE BLUE
OFFICIAL STATEMENT FILED.

SEPT. 16, 65
TENTH CIRCUIT OVERRULED
MOTION TO STRIKE BLUE

September 16, 1965 - O'Bryan's Motion to Strike the "Official Statement" denied by Court of Appeals.

November 30, 1965 - Judge Harper's judgment that Judge Chandler was judicially immune affirmed by Court of Appeals in which Opinion it is stated:

"The prolix document submitted by O'Bryan as an amended complaint covers twenty pages of the printed record, much of which is completely extraneous matter interposed with scandalous and scurrilous statements . . . The proposed amended complaint states that the acts of Judge Chandler were 'wrongfully, willfully, knowingly, purposely designedly, fraudulently, maliciously, oppressively and corruptly' performed." 352 P.2d 987.

February 25, 1966 - O'Bryan then filed a Petition for Certiorari in the Supreme Court of the United States which contained immaterial, false and scurrilous matter. No. 1059, Oct. Term, 1965.

DEC. 8, 65

O'BRYAN FILED LIBEL ACTION BASED ON DELIVERY OF TAN OFFICIAL STATEMENT TO OKLAHOMA JOURNAL EDITOR

December 8, 1965 - O'Bryan filed third libel action based on delivery of BLUE "Official Statement" to Oklahoma Journal Editor.

JAN. 7, 66

LIBEL ACTION REMOVED TO FED. COURT (NO. 66-8) BY CHANDLER

JAN 28,66 MOTION TO REMAND FILED

APR. 18,66 TRIAL BEFORE JUDGE AUSTIN

April 18, 1966 - There was no trial before Judge Austin. The Motion to Remand was heard.

O'Bryan v. Chandler, No. 1059, Oct. Term, 1965, United States Supreme Court.

May 2, 1966 - O'Bryan's Petition for Certiorari in $10,000,000 malicious prosecution, libel and slander suit (the second libel damage suit) denied by United States Supreme Court. O'Bryan v. Chandler, 384 U.S. 926, 16 L.Ed.2d 530, 86 S.Ct. 1444, reh. den. 385 U.S. 889, 17 L.Ed.2d 123, 87 S.Ct. 13.

MAY 24,66 JUDGE AUSTIN REMANDED LIBEL ACTION

May 24, 1966 - O'Bryan's Motion to Remand to State court was granted by Judge Austin and case was remanded without trial on merits of question of judicial immunity.

October 7, 1966 - Petition for Rehearing denied in $10,000,000 malicious prosecution, libel and slander suit by United States Supreme Court. 17 L.Ed.2d 123.

FEB. 20-25, 67

STATE COURT TRIAL ON LIBEL ACTION $50,000 JUDGEMENT FOR O'BRYAN. 40M — 10M

February 22, 1967 - O'Bryan amended Complaint during trial of foregoing action (the third libel damage suit) changing action from one based on the statements in BLUE brief to statements in TAN brief. This made the case again removable to Federal court under 28 U.S.C. §1446(b) ¶2.

February 24, 1967 - All evidence in foregoing case closed, which conclusively disclosed for the first time that at all times involved Judge Chandler was acting officially. There was no evidence whatever to the contrary. This made the case again removable to Federal court under 28 U.S.C. §1446(b) ¶2.

FEB. 26, 67

Sept 25-67

CHANDLER SIGNED SECOND REMOVAL ORDER (NO 67-88)

[Petition]

February 26, 1967 - Judge Chandler removed case for second time in strict compliance with removal statute; 28 U.S.C. §1441, §1442, §1446(a), §1446(b) ¶2, and 28 U.S.C. §1331.

O'Bryan v. Chandler, No. 1517 Miscellaneous, October Term, 1966, United States Supreme Court.

March 20, 1967 - O'Bryan filed this original action in United States Supreme Court against Judge Chandler seeking a Writ of Prohibition and Mandamus against Judge Chandler ordering him not to proceed further in Federal court in removed libel action.

May 24, 1967 - Judge Chandler obtained Washington counsel who filed Response to Motion for Leave to File Petition for Writ of Prohibition and Mandamus in foregoing action.

June 12, 1967 - Motion for Leave to File Petition for Writ of Prohibition and Mandamus denied by United States Supreme Court in foregoing action. 388 U.S. 904, 18 L.Ed.2d 1377, 87 S.Ct. 2131.

O'Bryan v. Chandler, No. 7400 Court of Appeals

June 8, 1967 - O'Bryan reopened Original Mandamus Action against Judge Chandler which had been denied by Court of Appeals in CA No. 7400 on September 13, 1963, by filing Motion to Specify (interpret the opinion).

O'Bryan v. Chandler, No. 170787 District Court of Oklahoma County, pending as No. 67-88 United States District Court by removal.

June 30, 1967 - O'Bryan obtained from State Judge and filed Journal Entry of Judgment against Judge Chandler in State court in violation of Federal Statute enjoining further proceedings in State court after removal, 28 U.S.C. 1446(e), which had been removed to Federal Court January 7, 1966 (No. 67-88) and was pending before Judge Battisti.

In the Matter Pertaining to W. H. Pat O'Bryan, Misc. No. 7 USDC.

March 28, 1967 - Judge Edwin Langley, Assigned, Heard Motion to Vacate O'Bryan disbarment Order, entered judgment holding disbarment Order of November 10, 1958, in all respects valid. App. P.

O'Bryan v. Judge Chandler, Court of Appeals No. 9563.

July 18, 1967 - O'Bryan filed untimely appeal from foregoing judgment improperly and incorrectly entitling the appeal. O'Bryan v. Chandler, 399 F.2d 916, cert. den. 394 U.S. 906, 22 L.Ed.2d 217, 89 S.Ct. 1014.

September 25, 1967 - Judge Battisti, sitting in Action No. 67-88 pending by second removal to Federal court as authorized by 28 U.S.C. 1446(b) ¶2, specifically found that the judgment entered in State court against Judge Chandler on June 30, 1967, was entered in violation of the laws of the United States, 28 U.S.C. 1446(e), and was null and void and entered Writ of Mandamus ordering O'Bryan and the State trial judge to expunge it from the State court records and proceed no further therein unless and until the action was remanded.

No interlocutory appeal was taken as authorized by 28 U.S.C. §1292(a)(1) and the Order of Mandamus and Prohibition became final. The Order was obeyed and the illegally entered Judgment was actually completely expunged from the State court records.

December 29, 1967 - By misrepresentations to Court of Appeals O'Bryan obtained reversal of Judge Langley's judgment In the Matter Pertaining to W. H. Pat O'Bryan, Misc. No. 7 USDC, in an ex parte hearing in which the

Order reversing Judge Langley was improperly entitled O'Bryan v. Chandler.

January 11, 1968 - Judge Chandler filed Motion to Clarify the foregoing Order of the Court of Appeals reversing Judge Langley wrongfully entitled O'Bryan v. Judge Chandler. CA 9563.

JAN. 13, 68
CHANDLER FILED DECLARATION JUDGEMENT ACTION (NO. 68-26)

Chandler v. O'Bryan, No. 68-26, USDC, WD Oklahoma.

January 13, 1968 - Judge Chandler filed the Declaratory Judgment Action now here for review.

FEB. 3, 68
O'BRYAN ASKED DECLARATORY JUDGEMENT ACTION BE MERGED WITH SECOND REMOVAL & REMANDED.

MAY 7, 68
JUDGE BATTISTI OPINION. SECOND REMOVAL RECORD NOT MATERIALLY DIFFERENT FROM RECORD BEFORE JUDGE AUSTIN - MORE TIME TO SHOW DIFFERENCE.

MAY 22,68
JUDGE BATTISTI ORDERED
REMAND OF SECOND REMOVAL
HELD IN ABEYANCE UNTIL
CONCLUSION OF DECLARATORY
JUDGEMENT ACTION.

June 13, 1968 - Headlines, Oklahoma City Times "Chandler Blistered in Disbarment Case" arising from false statements made by O'Bryan in disbarment action against him before Treasury Department which induced Treasury Department to dismiss disbarment charges against him and find false facts defaming Judge Chandler. Supp.R., last item.

SEPT.20,68
JUDGE BATTISTI OPINION.
NO MATERIAL DIFFERENCE IN RECORD.
15 MORE DAYS TO SHOW DIFFERENCE.

O'Bryan v. Chandler, CA 9563.

September 18, 1968 - Court of Appeals withdrew Opinion reversing Judge Langley under wrong title of O'Bryan v. Judge Chandler and affirmed his judgment upholding the legality of O'Bryan's disbarment under proper title In The Matter Pertaining to W. H. Pat O'Bryan. 399 F.2d 916.

October 10, 1968 - O'Bryan filed Petition for Rehearing in Court of Appeals in foregoing case.

November 5, 1968 - Petition for Rehearing denied by Court of Appeals in foregoing case.

O'Bryan v. Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, CA No. 9563, Sup. Ct. No. 1011, Oct. Term 1968.

February 3, 1969 - Counsel for O'Bryan petitioned United States Supreme Court for Certiorari In The Matter Pertaining to W. H. Pat O'Bryan, again under incorrect title as entitled above, including irrelevant scurrilous diatribe against Judge Chandler.

February 24, 1969 - Judge Chandler obtained Washington counsel and Mr. Shipley filed Brief in his behalf in the Supreme Court in foregoing knowingly incorrectly entitled case.

March 10, 1969 - The Supreme Court denied Certiorari in foregoing case. 394 U.S. 906, 22 L.Ed.2d 217, 89 S.Ct. 1014.

April 10, 1969 - Counsel for O'Bryan filed Motion for Rehearing including more irrelevant scurrilous matter in foregoing improperly entitled case.

April 21, 1969 - Petition for Rehearing denied by the Supreme Court. 394 U.S. 994, 22 L.Ed.2d 772, 89 S.Ct. 1456.

O'Bryan's Application for Reinstatement to the State Bar of Oklahoma.

September 23, 1969 - O'Bryan made false statements regarding his indictment by a Grand Jury and civil litigation in which he has been involved with Judge Chandler. Supp.R., Item 2.

Chandler v. O'Bryan, No. 68-26, USDC, WD Oklahoma.

February 2, 1970 - Order by Judge Battisti filed setting plaintiff's Motion for Summary Judgment for hearing at Cleveland, Ohio, on February 27, 1970.

O'Bryan v. Frank J. Battisti, United States District Judge, No. 1905 Misc., Oct. Term 1969 United States Supreme Court.

March 23, 1970 - O'Bryan filed Motion for Leave to File Petition for Writs of Prohibition and Mandamus and Petition for Writs of Prohibition and Mandamus against Judge Battisti requesting a stay of proceedings against him and enjoining him from proceeding further in the Declaratory Judgment action, No. 68-26 Civil, USDC, pending consideration by the full U. S. Supreme Court of the Motion for Leave to File Petition for Prohibition and Mandamus and Petition for Prohibition and Mandamus.

April 26, 1970 - Stay denied by United States Supreme Court: 397 U.S. 1019, 25 L.Ed.2d 529, 90 S.Ct. 1281.

O'Bryan Application for Reinstatement to Oklahoma Bar.

March 31, 1970 - Public hearing on O'Bryan's Petition for Reinstatement to Oklahoma Bar held.

APL.23,70
JUDGE BATTISTI GRANTED MOTION FOR SUMMARY JUDGEMENT; ENJOINED STATE COURTS & ORDERED VERDICT

AGAINST CHANDLER IN LIBEL ACTION EXPUNGED FROM STATE RECORD.

Chandler v. O'Bryan, No. 68-26, USDC, WD Oklahoma.

May 7, 1970 - Judge Battisti entered judgment in favor of Judge Chandler in Declaratory Judgment action. 311 F.Supp. 1121 and Opinion filed USDC June 12, 1969, not published. App. E.

O'Bryan v. Judge Battisti, No. 1905 Misc. U. S. Supreme Court.

May 18, 1970 - Motion for Leave to File Petition for Writ of Mandamus and Prohibition denied. 398 U.S. 902, 26 L.Ed.2d 79, 90 S.Ct. 1714.

O'Bryan Application for Reinstatement

December 21, 1970 - January 12, 1971: O'Bryan's application for reinstatement was denied by Supreme Court by Opinion dated December 21, 1970, filed January 12, 1971, on which date Petition for Rehearing was also denied, Vol. 42, page 33, The Journal, published by Oklahoma Bar Association, Opinions of Supreme Court prepared for publication by Office of The Chief Justice, in which the Court states:

"We adopt as the findings and the order of this Court the following quoted portions of the report and recommendation of the Board of Governors of the Oklahoma Bar Association and based thereon deny the application of Mr. O'Bryan to be reinstated to the practice of law in this state:

'THEREFORE, the Board of Governors of the Oklahoma Bar Association finds that the

applicant, William Howard Patrick O'Bryan, (a) has engaged in the unauthorized practice of law during the period of his suspension and that he (b) does not possess the moral qualifications required for admission to practice law in the State of Oklahoma, and (c) that he does possess the competency and learning in the law required for admission to practice law in the State of Oklahoma, and (d) that his resumption of the practice of law in Oklahoma would be detrimental to the integrity and standing of the bar, the administration of justice and the public interest. [Emphasis supplied]

'Wherefore, the Board respectfully recommends that the court [order] enter its order denying the application of William Howard Patrick O'Bryan for reinstatement to the practice of law in Oklahoma.'

"DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 21st day of December, 1970.

PAT IRWIN
Chief Justice"

Chandler v. O'Bryan, No. 71-884, Oct. Term, 1971, United States Supreme Court.

January 7, 1972 - Judge Chandler filed Petition for Certiorari to the United States Court of Appeals for the Tenth Circuit in this Declaratory Judgment action in which the Court of Appeals reversed Judge Battisti's judgment.

APPENDIX V

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
Plaintiff,)
)
v.) No. 18,800 - Cr.
)
W. H. PAT O'BRYAN,)
Defendant.)

[Filed Sept. 28, 1962]

O R D E R

The motion of the defendant for disclosure is granted. The matter requested appears to be a non-secret proceeding of the grand jury. This is disclosed by a transcript of such proceeding duly certified to by the official court reporter. A copy of such transcript, furnished to the Court by the United States District Attorney, who was personally present at the proceedings, is attached.

With reference to the defendant's motion to dismiss the indictment, the court first expunges from said motion to dismiss those allegations charging that the Chief Judge of this Court made a vile and irrational attack upon the defendant before the grand jury and demanded and ordered that the grand jury return an indictment against the defendant as being untrue and unsupported by the official transcript of the proceeding. However, even though on this occasion the grand jury requested the presence of the Chief Judge of this Court, it is possible that a technical irregularity occurred in the proceeding, in that the court, as such mentioning the defendant by name supplied information in connection with the matter under consideration by the grand jury, and regarding which an indictment was returned, and that said indictment should therefore be quashed without prejudice, of course, to any re-consideration of the matter by a future grand jury of this court.

IT IS THEREFORE ORDERED that the indictment is dismissed without prejudice and the defendant's appearance bond is exonerated.

Dated this 28th day of September, 1962.

/s/ Fred Daugherty
United States District Judge

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Supreme Court, U.S.
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FEB 4 1972
E. ROBERT [illegible] CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-884

STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,

Petitioner,

v.

WILLIAM H. PAT O'BRYAN,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HARVEY L. DAVIS,
3315 Daniels,
Dallas, Texas 75205,
REAGAN M. MARTIN,
700 United Fidelity Bldg.,
1025 Elm St.,
Dallas, Texas 75201.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10642 — 1455 ROUND TABLE DRIVE — DALLAS — 631-3130

In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,

Petitioner,

v.

WILLIAM H. PAT O'BRYAN,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To The Honorable Supreme Court of The United States:

Respondent respectfully urges that the Petition For Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit be denied.

STATEMENT OF THE CASE

Respondent incorporates as his statement of the case, the painstaking, exhaustive statement of the facts set out in the opinion of the Court of Appeals, 445 F. 2d 1045, at

pp. 1047-1051. The Court of Appeals sets out the complete history and factual background necessary to the understanding of the legal issues involved. Petitioner's statement is not factual, is selfserving and fails to state the background necessary to an understanding of the case.

Counsel for petitioner states on page 9 of the petition that he has spent several months in a " * * * sincere effort to prepare a Petition for Certiorari pointing out and documenting by the record the irrelevancy and inaccuracy of the gratuitous statements of the Court of Civil Appeals * * *". However, he concludes that " * * * it would be an imposition on the Court, and obscure the real issues * * *" if he did this. This is an amazing statement to make about the Court of Appeals setting by special designation of this Court. It does not seem that it would be an imposition on this Court if petitioner could point out any irrelevancy, accuracy or gratuitous statements of the Court of Appeals. Rather it was petitioner's duty to do so, if he could. With the delays and extensions of time to file his petition, he has had approximately eight (8) months to show any errors in the opinion either in the facts or the law stated therein. He has not done so, and it is submitted that the statement by the Court of Appeals can be accepted as accurate.

The petition does not mention that Mr. O'Bryan's libel action was a state action based on the libel laws of the state of Oklahoma. (Vol. II, Ex. No. 1.) That action was removed to federal court by petitioner. It was remanded to the state court by Federal District Judge Austin's finding that Judge Chandler's libel was committed outside of his judicial immunity and color of office, and that no federal

issues were involved. (Transcript of Proceedings, April 18, 1966, Vol. III, Ex. No. 23). The remand order by Judge Austin that no federal issues were involved gave the state court jurisdiction to try the libel action based on the laws of Oklahoma. Since the Oklahoma state court had jurisdiction of the libel action, petitioner's declaratory judgment violated the provisions of 28 U.S.C. § 1447(d) because it was an attempt to review the order of Judge Austin remanding the case which order is not reviewable.

It should also be pointed out that the petition attempts to narrow the decision of the Court of Appeals down to only one basis, namely that of federal jurisdiction. But the Court of Appeals gave another basis for its decision as follows:

> "Thus we conclude that there was no federal jurisdiction of the declaratory judgment action, and the judgment would have to be reversed on those grounds alone. *However, even assuming that sufficient jurisdiction had been shown, we think the order must be reversed for the reason that it was an improper interference with the state court's jurisdiction.*" (445 F. 2d at 1057) (emphasis supplied.)

REASONS FOR DENYING WRIT

1. The decision of the Court of Appeals is correct so there is no need for review.

2. There is no jurisdiction in the Federal District Court for petitioners declaratory judgment action and the petition fails to point out any valid basis for jurisdiction.

3. The petition fails to show why petitioners' declaratory judgment action is not an improper interference with the Oklahoma state court's jurisdiction.

This response rests primarily on the opinion of the Court of Appeals sitting by designation of this Honorable Court, reported at 445 F. 2d 1045 and perhaps attached as Appendix A to the Petition. (No appendices of any kind were attached to the copies of the petition furnished respondent.)

The petition does not show any reason or authority to question the correctness of the decision of the Court of Appeals. The petition does not give this Court any valid legal reason to review the decision of the Court of Appeals. It can be said that the essence of the petition is that Judge Chandler should have judicial immunity, regardless of the acts of libel he has committed, because he is a Federal Judge. The petition in effect, asks this Court to ignore all the facts, reasons and authority set out in the opinion of the Court of Appeals when it rejected similar arguments by petitioner.

The Court of Appeals correctly held there is no federal jurisdiction. In order to bring a case under the Declaratory Judgment Act, a plaintiff must fit his case within one of the jurisdictional statutes because the Declaratory Act is not of itself a jurisdictional statute. The Act is procedural in nature and neither augments nor diminishes the jurisdiction of the federal courts. *Skelly Oil Company v. Phillips Petroleum Company*, 339 U.S. 667 (1950). The only jurisdictional statute relied upon is 28 U.S.C.A., § 1331. It is only by very agile bootstrap lifting that petitioner has managed to create the appearance of Federal jurisdiction.

It is beyond dispute that the subsequent libel action does not violate the malicious prosecution judgment. Based on

the record it is shown as a matter of law that the judgment of the Court of Appeals in the malicious prosecution action related to a tort committed by Chandler on November 9, 1961. The judgment for Judge Chandler that he was judicially immune for his November 9, 1961, tortuous act is complete, final, and impregnable (Plaintiff's Exhibits 12 and 13, and 13 Supplement). That final judgment cannot possibly be violated by the subsequent libel action based upon the separate tort committed by Judge Chandler on August 15, 1965, a period of almost four years since the commission of his first tort.

This is an attempt to get a declaratory judgment that will render void the judgment of a state court. The Federal Trial Court had no jurisdiction of this suit brought by Judge Chandler claiming that the state court erred in deciding that he had no judicial immunity when he committed his libel against Mr. O'Bryan. *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923). The Federal Trial Court has no original jurisdiction to reverse or modify a state court judgment. *Hanna v. Home Insurance Company*, 281 F. 2d 298 (5th Cir. 1960); *cert. den.* 365 U.S. 838. A federal district court has no jurisdiction of suits to nullify state court judgments. This is the law even though the action is based on the presence of a federal question. *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 396 U.S. 1201 (1970); *Manufacturers Record Publishing Company v. Lauer*, 168 F. Supp. 234 (D. C. La. 1959); affirmed 268 F. 2d 187; *cert. con.* 361 U.S. 913.

The method utilized in the summary judgment declaratory judgment action was an abuse of the Declaratory

Judgment Act, Title 28 U.S.C.A., § 2201. The Supreme Court has declared that the Act is procedural in nature. *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227 (1937). The Act creates no substantive rights. *McCarty v. Hollis*, 120 F. 2d 540 (10th Cir. 1941). Petitioner is attempting, under an act that is procedural in nature, to wipe out the substantial rights of Mr. O'Bryan in his cause of action for libel. Petitioner is also using this act, procedural in nature, to create in himself a substantive right to wipe out and eliminate Mr. O'Bryan's substantive judgment that was won on the merits in the Oklahoma State Court.

The Declaratory Judgment Act looks to the future in the sense that it seeks to adjudicate and determine rights and liabilities, procedurally, so as to avoid *future* controversies and lessen damages and expenses.

Petitioner is attempting to utilize the Declaratory Judgment Act, a procedural act, to determine the substantive law question of judicial immunity. Moreover, he is attempting to use this procedural act to pass on the substantive question of judicial immunity which has already been heard by a federal court in all of the pertinent aspects that were *again* presented to the trial court.

The *only* case authority cited in the entire petition is on page 11 where part of a sentence from the opinion of the Court of Appeals is quoted as follows: "It is true that the immunity issue is a federal question. Howard v. Lyons, 360 U.S. 593, 597 (1959) * * *." The entire sentence by the Court of Appeals is as follows:

> "It is true that the immunity issue is a federal question, Howard v. Lyons, 360 U.S. 593, 597, 79 S. Ct. 1331, 3

L. Ed. 2d 1454 (1959), *but it is in the nature of a federal defense to a suit instituted under state law. As such, it is not sufficient to convey original jurisdiction on a federal court.*" (Emphasis supplied)

Petitioner presented his federal defense of judicial immunity in Judge Austin's Federal District Court and then in the Oklahoma state court trial on the merits. That defense was found not valid in both courts.

Petitioner's "Reasons For Granting The Writ" Have No Validity And Are Not Supported By Authority

Under petitioner's "Reasons For Granting The Writ" five items are listed. These five items are not five different reasons for granting the writ. None of the listed items have validity.

The first reason stated that the question decided by the Court of Appeals involves the narrow federal question of the jurisdiction of the United States District Court in a declaratory judgment action to entertain and determine the question of the judicial immunity of a federal judge for "official" acts performed by him. This does not accurately state the basis for the Court of Appeals opinion. Most importantly it omits the fact that Federal District Judge Austin in the first removal, remanded the case after he determined that the libel committed by Judge Chandler was not an *official* act performed by him. The trial on the merits in the Oklahoma State court also found the libel by Judge Chandler was not done under his judicial immunity.

It is next stated that this important federal question should be settled by this Court and that the decision of the Court of Appeals appears to be directly contrary to the

relevant decisions of this Court. No relevant decision of this Court was cited anywhere in the petition.

It is next stated that the decision of the Court of Appeals is in conflict with the relevant decision of all other courts of appeal on the same matter. No decisions are cited anywhere in the petition to support this statement.

It is next stated there is no rule of law or adjudicated case to sustain it. (The Court of Appeals decision) This statement has no validity because the opinion of the Court of Appeals is replete with statements of rules of law and adjudicated cases sustaining its opinion.

And finally, it is stated that if the Court doesn't grant certiorari the petitioner will be required to go through the ordeal of a state court trial, appeal to the State Supreme Court and then bring the matter here for final decision. This contains a misstatement because the state court trial has already been completed. As the Court of Appeals pointed out and as this Court has also pointed out in *Public Service Commission v. Wycoff*, 344 U.S. 237, petitioner should attempt review of the state court trial in the Oklahoma Supreme Court and then, if desired, petition for certiorari to the Court for review. That is the proper and legal way to attain the ultimate decision on the merits.

THE PETITION FAILS TO DISCUSS THE ISSUES

The petition fails to meet and answer the legal issues that are raised in this cause and dealt with in the opinion below. It is of extreme significance to note what the peti-

tion fails either to mention or adequately discuss. It fails to discuss:

1. The trial before the Honorable Richard B. Austin on the first removal and remand of the libel action where all of the legal issues raised by this declaratory judgment action were considered and passed on. The Court of Appeals found on the record this to be true. (445 F. 2d at page 1054)

2. The petition fails to deal with the issue of whether the record in the libel action presented to the Honorable Judge Battisti in the second removal and motion for remand action was before the Honorable Judge Austin in the first removal and remand trial. The Court of Appeals found on the record that Judge Austin had previously considered all the matters passed on by Judge Battisti (445 F. 2d at page 1054).

3. The petition fails to mention or discuss why the decision of Judge Austin holding that the libel committed by Judge Chandler against Mr. O'Bryan was not performed by Judge Chandler officially in his capacity as a United States judge or under the color of the office of a United States judge and that no federal issues were involved, is or is not *res judicata* and therefore a conclusive legal bar to the very same issues raised by Judge Chandler in his declaratory judgment action. The Court of Appeals held Judge Austin's decision is res judicata as to the issue of the forum (445 F. 2d at 1057).

4. The petition does not mention or discuss the issue of whether this declaratory judgment action is a disguised attempt to obtain a review of Judge Austin's remand order.

5. The petition does not mention or discuss the issue of whether the libel action against Judge Chandler could be merged in the holding by the 10th Circuit Court of Appeals in *O'Bryan v. Chandler*, 352 F. 2d 987 (1965), that Judge Chandler's actions in the prior mali-

cious prosecution action were judicially immune in view of the undisputed fact that the 10th Circuit Court of Appeals was completely unaware of Judge Chandler's actions in committing the libel at the time the Court wrote its opinion in *O'Bryan v. Chandler*, 352 F. 2d 987 (1965). The Court of Appeals found from the record the Court writing the opinion in 352 F. 2d 987 was completely unaware of Judge Chandler's libelous actions. (445 F. 2d at pages 1054, 1055)

6. The petition does not meet the issue of whether Federal District Court wrongfully issued writs of mandamus and prohibition to the Oklahoma state court as has been repeatedly held in many federal cases, the latest one being *Atlantic Coast Line R. Co v. Brotherhood of Locomotive Engineers*, 396 U.S. 1201 (1970).

A trial on the merits of the libel action against petitioner has been held in the state court of Oklahoma. (Vol. II, Ex. No. 17) In that trial it was found that his libelous statements were made outside the broad limits of his judicial immunity. An appellate review of the decision in that state court case can only be had by an examination of the certified record of the proceedings in the trial on the merits. Petitioner has not brought forward the certified record of that trial. His proper method is to bring that record by appeal before the Oklahoma Supreme Court and ultimately by writ of certiorari to this Court if the Oklahoma Supreme Court rules against him. This is the route that petitioner should have followed after the state court trial on the merits almost five years ago. (Feb. 20-25, 1967, Vol. II, Ex. No. 17) His tactics in preventing a final decision on the merits of this matter for five years is a reprehensible abuse of the judicial process. We urge this Honorable Court to deny this petition and if possible issue orders that put an end to peti-

tioners delaying dilitory tactics in interfering with the Oklahoma State Courts jurisdiction.

CONCLUSION

By reason of the foregoing, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-884

STEPHEN S. CHANDLER,
UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF OKLAHOMA,

Petitioner,
(Plaintiff-Appellee, Court Below)

v.

WILLIAM H. PAT O'BRYAN,

Respondent,
(Defendant-Appellant, Court Below)

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

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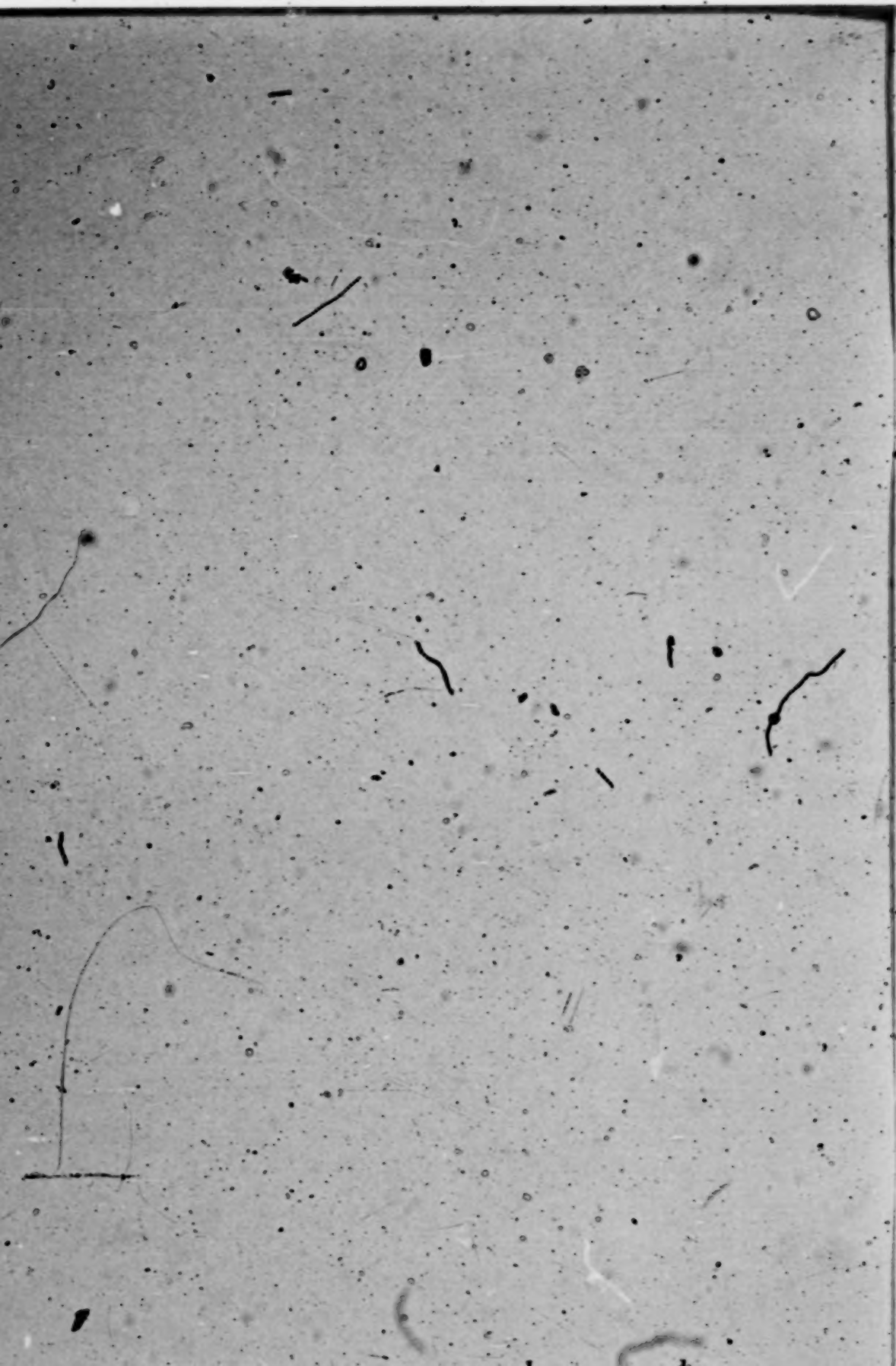

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IN THE

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OCTOBER TERM, 1971

No. 71-884

STEPHEN S. CHANDLER,
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Respondent,
(Defendant-Appellant, Court Below)

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

The Petitioner respectfully moves the Court for an order vacating its denial of the Petition for Writ of Certiorari, entered on February 28, 1972, and for an order granting the Petition. As grounds therefor Petitioner states:

Petitioner limited his presentation in the Petition for Certiorari to the error of the Court of Appeals in holding that

the trial court lacked jurisdiction to enter the Declaratory Judgment of judicial immunity upon which ground the Court of Appeals based its reversal of the trial court.

This Petition for Rehearing is limited to completely new substantial and controlling grounds available to Petitioner although not previously presented which were injected into the case by the Response to the Petition. Unfortunately Petitioner with due diligence was unable to complete and file a reply to the Response prior to the entry of the order denying certiorari.

In view of the surprising nature of the irresponsive and irresponsible position taken by counsel for Respondent in the Response and their deliberate reassertion of and reliance upon incorrect material facts and the legal conclusions on irrelevant points of law discussed by the Court of Appeals, the filing of a reply thereto was absolutely necessary if the Court was not going to be led into error.

NEW QUESTIONS PRESENTED

The new questions are broader in scope and of even greater public importance than the jurisdictional question presented in the Petition for Certiorari. The new questions raised by the Response are:

1. Does a Federal officer have the *absolute* right to remove a State court libel action to Federal court for adjudication of the question of his judicial immunity from liability upon strict compliance with the Federal removal statutes, 28 U.S.C. §§ 1442-1446?

2. Did the Court of Appeals have jurisdiction in this action to order the trial court by "precatory" suggestions to remand to State court a related case pending before the trial judge which had been removed to Federal court by a Federal judge who had strictly complied with the applicable Federal removal statutes and thus has the *absolute* right to have the question of his judicial immunity adjudicated on the merits by the Federal trial court?

3. Do such "precatory" directions usurp the jurisdiction of the trial judge in the performance of a discretionary function?

4. Did the pendency of a State court action involving some of the same questions defeat the jurisdiction of the trial court to enter the Declaratory Judgment of judicial immunity in the instant case where no State law nor Federal-State conflict is involved?

5. Should the Petition for Rehearing be denied because the Court of Appeals, misled by Respondent, based its decision on irrelevant erroneous facts which were relied on by this Court, or should the Court, however seemingly incredible, accept Petitioner's statement as to the *relevant record facts* which are fully substantiated by the Appendix to the Petition for Certiorari?

6. Should the Court question the propriety of the *reassertion by counsel* in the Response of patently incorrect and misleading statements of fact contained in the Opinion of the Court of Appeals which may have and probably did mislead this Court? What ethical duty does counsel owe to the Court under such circumstances?

REASONS FOR GRANTING THE WRIT

These new questions furnish important additional grounds for the granting of the Writ because of their general public importance. The conclusions of the Court of Appeals on important points of Federal law appear to be directly contrary to the relevant decisions of this Court and are in direct conflict with the relevant decisions of the Courts of Appeals of all other circuits on the same matters.

The actions of Respondent and his counsel strike at the heart of our legal system at a time when law and order and the orderly dispatch of justice are being ruthlessly attacked from all sides and especially by disruptive conduct of counsel.

There is no difference in principle in disruptive conduct in the courtroom and the harassment of a judge for his official acts by the prosecution of *groundless defamatory litigation* against him in order to obtain wide defamatory dissemination by the news media, knowing that they are sheltered by the shield of professional privilege which furnishes them immunity from personal liability. Both types of misconduct breed contempt for all courts and all judges as well as the Constitution and the laws of the Country. And it is of primary importance that a few members of the bar should not be permitted to misuse and abuse the processes of the courts in their efforts to disrupt and destroy them.

STATEMENT OF THE CASE AS NOW POSED

Petitioner will not enter into a lengthy discussion of the inaccurate facts and irrelevant points of law contained in the Opinion of the Court of Appeals and reasserted and relied on by counsel in the Response. Of necessity, a few of the erroneous facts must be pointed out and corrected to demonstrate that the Court of Appeals based its reversal of the trial court on facts which are wholly different from those found by the trial court and indisputably disclosed by the record before this Court.

The facts primarily relied on by the Court of Appeals in reaching its conclusions are not supported by the record which is made up almost entirely of court records of matters long *res judicata*. The record shows clearly that all pertinent relevant facts were undeniable record facts.

At the outset counsel for Respondent state on page 1 of the Response that

> "Respondent incorporates as his statement of the case, the painstaking, exhaustive statement of the facts set out in the opinion of the Court of Appeals, 445 F.2d 1045, at pp. 1047-1051. The Court of Appeals sets out the complete history and factual background necessary to the understanding of the legal issues involved. *Petitioner's statement is not factual,* is

> self-serving and fails to state the background necessary to an understanding of the case." (Emphasis supplied.)

This surprising statement by counsel and on page 2 of the Response their direct challenge to Petitioner that if he could point out any irrelevancy, inaccuracy or gratuitous statements of the Court of Appeals it was his duty to do so, makes it necessary for Petitioner to point out at least some of the inaccurate statements of fact and the irrelevancy of some of the matters discussed at length by Judge Gibson and the inapplicable legal conclusions drawn therefrom, an arduous and time-consuming task. It would take many times the 45 pages used by the Court of Appeals to point to all of them and detail the correct facts shown by the record. Total silence under the circumstances would lend the impression that there was at least *some* factual basis for the action of the Court of Appeals in reversing the trial court.

Counsel realizes that such a complete departure by a Court of Appeals from the pertinent record before it is so unusual as to cast doubt on his categorical statement that certain important facts were erroneous and certain conclusions of law completely irrelevant; that his categorical statement standing alone would seem almost unbelievable to the Court and burdens him with the professional duty to either withdraw it or prove it beyond any question of doubt. For this reason counsel for Petitioner reluctantly departs from his original resolution not to obscure the real issues by such an attempt and as briefly as possible makes the following statements verified by a careful perusal of the voluminous court records in the series of Mr. O'Bryan's retributory litigation against Judge Chandler which point up some of the more important factual errors detailed by the Court of Appeals in the hope that this Court will look askance at the *entire* 45 page Opinion which goes behind the facts finally adjudicated by other courts, weighs the evidence and finds its own interesting facts long ago *res judicata* to the contrary, which findings cast doubt upon the verity of the former decisions and appear to make a martyr of Mr.

O'Bryan, a disbarred lawyer who has ruthlessly defamed Judge Chandler and inflicted upon him the burden of defending the groundless litigation listed on 17 pages of Appendix U to the Petition, the same Mr. O'Bryan who many years after his disbarment by the Oklahoma Supreme Court recently made application for readmission to the Bar of the State of Oklahoma and to whom, after a public hearing, at which, by agreement, because of the pendency of this litigation, no evidence was offered of his defamatory harassment of Judge Chandler for so many years, on January 12, 1971, the Supreme Court of Oklahoma denied readmission to the Oklahoma Bar for other ethical misconduct upon the stated ground that he *"does not possess the moral qualifications required for admission to practice law in the State of Oklahoma"* and found *"that his resumption of the practice of law in Oklahoma would be detrimental to the integrity and standing of the Bar, the administration of justice and the public interest"*, APPENDIX S-2 to the Petition for Writ of Certiorari. Yet the "background facts" recited in the Opinion of the Court of Appeals actually make it appear that a Federal judge has misused his high office to wrong an innocent lawyer.

But the most surprising thing about the Response which Petitioner regrets the necessity of calling to the attention of the Court, is that counsel for Respondent, as above stated, *reassert* and rely upon the misstatements of fact contained in the Opinion of the Court of Appeals knowing them to be erroneous, when it was their professional duty to this Court to admit that such of the facts as are directly contrary to the facts shown by the record in the case and verified by the contents of the Appendix to the Petition for Certiorari were not true. They knew from actual conduct of the litigation for about seven years that certain of the important facts relied on by the Court of Appeals were false. Their failure to so admit or rather their almost unbelievable reaffirmation of the erroneous facts in the Response may well have led this Court into error, to say the least their conduct

caused this Court to enter the order denying certiorari while undoubtedly assuming the truth of the factual statements of the Court of Appeals which counsel verified by reasserting and relying on in the Response. This is especially true since the court did not have before it a Reply by Petitioner to the misleading Response.

It is also especially significant that although counsel state that "Petitioner's statement is not factual" the Response does not challenge a single statement of fact contained in the Petition for Certiorari which is supported by the Appendix verifying all of the facts relied on in the Petition.

On page 3 the Response does challenge the failure of Petitioner to quote Judge Gibson's irrelevant statement that " 'however even assuming that sufficient jurisdiction had been shown, we think the order must be reversed for the reason that it was an improper interference with the State court's jurisdiction' (445 F.2d at 1057) (emphasis supplied.)" Petitioner now answers it. This erroneous conclusion of the court is contrary to well settled law. The pendency of another action involving some of the same issues (or for that matter all of them) does not preclude a Federal court from determining the question of judicial immunity in a Declaratory Judgment action. See *Maryland Casualty Company v. Pacific Coal & Oil Company*, 312 U.S. 270, 85 L.Ed. 826, 61 S.Ct. 510 (1941), and *Sears, Roebuck v. Zurich*, 422 F.2d 587, C.A. 7, 1970. These cases so hold and at the same time make it clear that it would have been an abuse of discretion for Judge Battisti to have refused to assume jurisdiction and adjudicate the rights of the parties under the circumstances existing here. The court had original jurisdiction, State libel laws are inapplicable, no Federal-State conflict is involved, *a multiplicity of suits would be avoided and the Federal courts have preempted the exclusive right to adjudicate the question of the immunity of Federal officers who assert by verified Petition for Removal that their acts were performed under color of office or in the performance of their duties.*

The third libel action brought by Respondent against Judge Chandler which was removed from State court and is now pending before Judge Battisti is only *one* of the many actions brought by Mr. O'Bryan against Judge Chandler and only one of three actions which were pending against him at the time he filed the Declaratory Judgment action, from each of which pending actions Judge Chandler sought relief in the Declaratory Judgment action.

The other two actions pending at that time were *O'Bryan v. Chandler*, APPENDIX Q-1 to Q-3 and Q-4 to Q-6 to the Petition for Certiorari and *O'Bryan v. Chandler*, Original mandamus action No. 7400 in the Court of Appeals for the Tenth Circuit which Mr. O'Bryan had then recently reopened. These two actions were disposed of more than a year after the institution of this Declaratory Judgment action when the Supreme Court denied the Petition for Certiorari in a case knowingly filed by Mr. O'Bryan and his counsel against Judge Chandler under the wrong title, which made it necessary for Judge Chandler to obtain counsel and defend the action, *O'Bryan v. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma*, No. 1011, October Term 1968, cert. den. 394 U.S. 906, 22 L.Ed.2d 217, 89 S.Ct. 1014; Pet. for Reh. Den. April 21, 1969, 394 U.S. 994, 22 L.Ed.2d 772, 89 S.Ct. 1456 (APPENDIX Q to Petition for Certiorari, page 6).

The relief sought by Declaratory Judgment goes far beyond the relief obtainable by final adjudication of the *three* cases pending at the time it was filed. It encompasses not only those actions but *future* actions which past experience indicates Judge Chandler has every reason to expect will be filed if relief is not granted here. This action also encompasses damages for the series of present and past groundless actions and envisages the power of the Court *sua sponte* to take punitive action.

What Judge Chandler *actually* sought and still seeks and what he obtained in the trial court was *another* judgment of judicial immunity for certain official acts and acts *in relation*

thereto, some of which acts are the basis of Mr. O'Bryan's pending third libel action. Judge Chandler also sought and still seeks enforcement of the judgment of judicial immunity pronounced by Judge Battisti as well as enforcement of the *already existing final judgment* of judicial immunity in the malicious prosecution, libel and slander action (APPENDIX N to the Petition for Certiorari) which not only granted him judicial immunity for the acts there involved but also for the acts involved in the pending libel action, in aid of the jurisdiction of *both* Federal courts and to protect and effectuate both judgments.

As one concrete illustration of the many inaccurate facts stated in the Opinion of the Court of Appeals, Judge Gibson states in the first sentence of the first paragraph of the Opinion that Judge Chandler is a "*Senior* Judge", that he sought to have Mr. O'Bryan enjoined "from enforcing a libel *judgment* for $50,000 obtained in the State courts of Oklahoma against" him and to have "the *judgment* in the State court expunged from the record." (Emphasis supplied.)

Three patent errors of fact are thus embodied in the Opinion at the very outset, two of them positive misstatements of *important* record facts. The nonexistent State court *judgment* twice referred to in the first paragraph was later in the Opinion twice reiterated under the heading "THE FACTS", pp. 1050, 1051, and twice again under the heading "THE LAW" as the specific controlling bases for conclusions of law, pp. 1051, 1056.

The record facts are that a void State court judgment which had been unlawfully entered some months before this action was filed had been ordered expunged by Judge Battisti in the related libel action as having been entered after removal in violation of Federal law, APPENDIX J to Petition for Certiorari, and had been *actually expunged* by the State court.

It cannot be overemphasized that there is no *State court judgment against Judge Chandler.* Yet counsel for Respondent state on page 5 of the Response that Judge Chandler

claims "that the state court erred in deciding that he had no judicial immunity when he committed his libel against Mr. O'Bryan" and argue that "The Federal Trial Court has no original jurisdiction to reverse or modify a state court *judgment*", citing three United States Supreme Court cases and one Fifth Circuit case.

THERE IS NO STATE COURT JUDGMENT AGAINST JUDGE CHANDLER

On page 6 of the Response, it is also asserted that the Declaratory Judgment Act creates no substantive rights and that Judge Chandler is trying "to wipe out and eliminate Mr. O'Bryan's substantive *judgment* that was won on *the merits* in the Oklahoma State Court".

Judge Gibson bases his legal conclusion on page 1056 of the Opinion, APPENDIX A-12, on the false assumption that a State court *judgment* exists. He states:

> "O'Bryan's cause of action is solely based on *state libel laws*, and in no way raises a federal question in and of itself. Judge Chandler's assertion of judicial immunity is 'in reality in the nature of a defense' to that suit. Therefore, it does not confer original federal question jurisdiction in the declaratory judgment action. The application of this principle is particularly apposite in the present case where the state court action is not merely threatened, but *has actually been instituted and carried to judgment.*" (Emphasis supplied.)

The *record* facts regarding this much heralded *judgment* are that *after* the third State court libel action which is still pending became again removable to Federal court on either of two valid grounds, of course assuming that it was not removable when first removed and was not erroneously remanded by Judge Austin:

(1) by reason of the voluntary amendment of the original Petition by counsel for Mr. O'Bryan over Judge

Chandler's objections on February 23, 1967, during the State court trial;

and

(2) by reason of the fact that at the close of the evidence by both parties on February 24, 1967, *all* of the evidence in the case showed that Judge Chandler was at all times acting under color of office and in the performance of his official duties.

Immediately and on February 26, 1967, Judge Chandler again removed the case to Federal court strictly in accordance with Federal removal procedure as specifically authorized by 28 U.S.C. § 1446(b), para 2, and 28 U.S.C. § 1442.

After the case was again pending in Federal court, Mr. O'Bryan and his counsel petitioned this Court for a Writ of Prohibition against Judge Chandler ordering him not to proceed further in Federal court in the removed libel action on the ground that it was illegally removed. Judge Chandler obtained Washington counsel who filed Response thereto. *After* this Court had on June 12, 1967, denied the Petition, 388 U.S. 904, 18 L.Ed.2d 1377, 87 S.Ct. 2131, *thereafter* and on June 30, 1967, in the face of the refusal of this Court to intercede and in defiance of the Federal statutory prohibition contained in 28 U.S.C. § 1446(e), Mr. O'Bryan and his counsel without prior notice to Judge Chandler procured, from the State judge and filed in the libel action in State court, a purported Journal Entry of Judgment against Judge Chandler for $50,000.

When the illegal entry of the judgment was called to his attention, Judge Battisti, on September 25, 1967, entered a mandatory Writ in the removed pending libel case ordering Mr. O'Bryan and the State judge to expunge the judgment as having been entered in violation of the Federal statutory injunction. Respondent and his counsel thereupon acquiesced in the order, took no interlocutory appeal, as authorized by 28 U.S.C. § 1292(a)(1), had the State court comply with the order and actually expunge the void judg-

ment. No punitive order was entered against Respondent and his counsel.

The Writ of Prohibition and Mandamus prohibing the State court and Mr. O'Bryan from proceeding further in said action in State court and ordering that the void judgment be expunged is set out *verbatim* as APPENDIX J to the Petition for Certiorari.

This third State court libel action against Judge Chandler is still pending before Judge Battisti who has stayed action until the final determination of this case which will make decision there unnecessary if his judgment in this case is affirmed.

REMOVAL OF CASES BY FEDERAL OFFICERS

It is important to note that the Response has now broadened the issues to include the question of the right of Federal officers to remove actions to Federal Court.

Respondent and his counsel requested the Court of Appeals in this action to enter a Writ ordering Judge Battisti to remand the pending libel action to the State court although that action was not before the Court for review, or otherwise. They now seek that relief from this Court. The last sentence of the Response states:

> "We urge this Honorable Court to deny this petition and if possible issue orders that put an end to petitioners delaying dilatory tactics in interfering with the Oklahoma State Courts jurisdiction."

It should be noted that Judge Gibson in his discussion of the judgment of the trial court was careful to point out *twice* that he was referring *only* to the *published* opinion of Judge Battisti, APPENDIX E-1 thru E-7, thus ignoring the well-reasoned and convincing *unpublished* opinion of Judge Battisti dated June 12, 1969, detailing the reasoning underlying his Order overruling Respondent's Motion to Dismiss the Declaratory Judgment action and the exercise of his discretion to assume jurisdiction of the action, advance

it on the calendar and give it priority over the disposition of the libel action. The reasoning and the authorities cited to support his action are unanswerable. It is set out verbatim in APPENDIX E-1 to E-7 to Petition for Certiorari.

RESPONDENT CITES NO AUTHORITY THAT SUPPORTS HIS POSITION

The cases cited in the Response to support Respondent's position hold that the Declaratory Judgment Act is procedural only, that it enlarged the range of remedies available in the Federal courts but did not extend their jurisdiction. Petitioner does not rely on the Declaratory Judgment Act for jurisdiction. He relies on the Declaratory Judgment Act as authority for the form of the action *only*.

Petitioner relies on 28 U.S.C. § 1331(a) as conferring *jurisdiction* on the court to entertain the action and adjudicate the Federal question of judicial immunity which is the gravamen of the action.

In this connection the Court of Appeals stated:

> "It is true that the immunity issue is a federal question * * * *but it is in the nature of a federal defense to a suit instituted under state law. As such,* it is not sufficient to convey original jurisdiction on a federal court. (Emphasis supplied)" Opinion, page 1055, APPENDIX A-11.

Judge Gibson cites as authority for his statement and quotes at length from *Public Service Commission v. Wycoff Co.*, 844 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952). Had he also quoted the first sentence of the next paragraph it would be clear that the Court in *Wycoff* did not so hold and we find no other case from this Court so holding.

Petitioner relies on Rule 57 F.R.C.P. for the grant of authority to the trial court to advance the action on the calendar and give it priority over the pending libel action. A determination of the libel action would not give Petitioner the complete relief afforded by the Declaratory Judgment

action. If allowed to stand the Declaratory Judgment terminates the libel action as well as the long-existing controversy.

Petitioner relies on the exceptions contained in *28 U.S.C. § 2283* as evidencing the power of the court to enjoin the State court in aid of *its* jurisdiction and to protect and effectuate *its* judgment and *the earlier judgment* of the Court of Appeals decreeing judicial immunity for the acts involved there, *O'Bryan v. Chandler*, 352 F.2d 987, *APPENDIX N* to Petition for Certiorari, and, of course, prior and future acts *in relation thereto*.

Petitioner now joins in Respondent's request that this Court determine the question of the legality of the removal of the pending libel action to Federal court which is within the jurisdiction of this Court by reason of its potential appellate jurisdiction. This would relieve the trial judge of the possible embarrassment of refusing to follow the gratuitous "precatory" directive of the Court of Appeals that he remand that case to State court.

It is of signal importance to note that while the Court of Appeals did not enter the Writ requested by Respondent, it, nevertheless, stated in the Opinion:

> "Appellant O'Bryan, in addition to urging reversal of the judgment in the declaratory judgment action, requests us to enter an order requiring remand of the second removal of the libel suit to the State court. Since this matter is still pending in the trial court and has not been finally acted upon, we do not feel that we have jurisdiction to grant this relief. *We assume* that any further action taken in this matter *will be in conformity with the views expressed in this opinion.*" (App. A to Pet. for Cert. at p. 14).

The suggestive language of the last sentence refers to the discussion in the Opinion of the irrelevant question of the legal effect of the remand by Judge Austin of Chicago, assigned, of the libel case when first removed; the effect

of that remand as making the question of judicial immunity *res judicata*, the removability of the case in the first instance, and the legality of the second removal, pages 1061 to 1064 and pages 1057 and 1058 of the Opinion, APPENDIX A to the Petition, A-7 to A-10, A-13 and A-14. None of these questions were properly before the Court of Appeals and were, therefore, not briefed by Petitioner since they were totally irrelevant to the issues in the Declaratory Judgment action.

Such attempts to control the discretionary decisions of trial judges at the trial level are clearly illustrated by the case of *United States District Court and Honorable Jesse W. Curtis v. Court of Appeals for the Ninth Circuit, Rozalio U. Munoz and Michael E. Tigar*, 339 F.2d 1176; 344 F.2d 434 (C.A. 9, 1971), where similar "precatory" language was held by the Ninth Circuit Court of Appeals to Constitute a mandatory Writ giving positive directions to the trial court. When the District Judge failed to follow the polite directions of the Court of Appeals, he was, in no supplicatory language, summarily ordered to do so and the mandate was ordered issued *forthwith*. The court stated:

> "This Court did not remand the cause for the purpose of permitting the District Court to reach a construction of the rule at variance with that stated by this Court. The *precatory* language of the opinion about resolving the ambiguity in the applicants' favor apparently led the District Court. [1] into overlooking our *directions*." (Emphasis supplied) 344 F.2d 434, 435.

The decision there involved the exercise of judicial discretion by the trial judge as does Judge Gibson's suggestion here.

In view of the precedent thus established by the Court of Appeals for the Ninth Circuit which apparently for the first time brought to the light of day the practice of some Courts of Appeals to attempt to control the discretionary actions of trial courts, it is possible that the polite language

used by Judge Gibson may be interpreted by Judge Battisti to constitute a "precatory" Writ of Mandamus even though the Court of Appeals did not have jurisdiction to enter such a Writ. *Platt v. Minnesota Mining and Manufacturing Company*, 376 U.S. 240 (1964).

If this Court does not act to prevent it, it is possible that Judge Battisti may proceed to remand the case even though the law is well settled that a Federal officer has the *absolute* right to remove such a case. The cases holding that actions against public officers are removable to Federal court under § 1442(a)(1) *as a matter of right*, as different from cases removed under § 1441 where the removability must appear on the face of the Petition, and that where the fact that the defendant is a Federal officer does not appear from the State court petition, the affidavit of the public official in the Petition for Removal furnishes that element, are legion. See *Poss v. Lieberman*, 187 F.Supp. 841, 299 F.2d 358, cert. den. 371 U.S. 944, 8 L.Ed.2d 810, 82 S.Ct. 1586.

This question is no longer just lurking in the background. The Response has made it a vital issue here which can no longer remain unanswered on the ground that it is irrelevant.

This issue alone is of such importance to the public and the judiciary as a whole as to call for the granting of the Writ and the review of this additional compelling issue.

Counsel feels certain that the Court of Appeals did not understand the true facts disclosed by the voluminous record. He feels doubly sure that this Court, relying on the confusing opinion of the Court of Appeals and the irresponsible affirmation of the erroneous facts in the Response filed by counsel for Mr. O'Bryan, did not understand the pertinent facts.

All of the points of law actually involved are indisputably well settled. That the trial court had jurisdiction of the action, this Court and the courts of all circuits are in full accord. Neither sound reasoning, nor any statute or rule of law, nor any adjudicated case supports the judg-

ment of the Court of Appeals. The well-settled case law of this Court and of all circuits supports the judgment of the trial court. For this reason counsel has burdened this paper with the citation of only a few of the available authorities.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the Petition and review the judgment and opinion below. Every good purpose will be served by the granting of the Writ and the summary affirmance of the judgment of the trial court.

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March 24, 1972

CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Carl L. Shipley
Counsel for Petitioner